Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HAROLD A. HOUDEK, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the Colorado Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Colorado Court of Appeals correctly hold that petitioners' common law claims for alleged fraud are preempted by the Employee Retirement Income Security Act (ERISA) when the Tenth Circuit Court of Appeals previously determined that they lack standing to bring ERISA claims to redress the same alleged fraud?

2. Did the Colorado Court of Appeals correctly hold that petitioners' common law claims for fraudulent discharge "relate to" their ERISA covered pension plan, and are thus preempted, when the sole "connection" between the state claims and the pension plan is that respondent employer allegedly misrepresented proposed amendments to the plan as the "means" to procure petitioners' discharges?

3. Did Congress intend to grant employers a safe harbor for misconduct in the employment relationship—between the whirlpool of ERISA preemption and the rock of ERISA standing?

LIST OF PARTIES

Petitioners, plaintiffs-appellants, below:

Harold A. Houdek, Frederic J. Raymond, J.A. Morrison, George H. Liveris, Robert A. Irwin, Cecil J. Allmon, Jose Augusto, Jr., R.S. Banner, Jr., A.D. Bond, Clemont H. Bruce, Harvey A. Carson, Jr., Billy Jack Dunn, Virginia Howard, Sylvester J. Jaye, T.L. Martin, Ira S. Reavis, E. Shepard, Herman B. Thomason, Marion Leon Thompson, Billy Rhea Sargent, and Clarence E. White, for themselves and on behalf of others similarly situated.

Respondent, defendant-appellees below:

Mobil Oil Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, plaintiffs below, petition for a writ of certiorari to review the judgment of the Colorado Court of Appeals.

OPINION BELOW

The opinion of the Colorado Court of Appeals is reported at 879 P.2d 417, *cert. denied* (1994) and is reprinted in the Appendix hereto at 1a-16a.

RELATED CASES

Raymond v. Mobil Oil Corp., 983 F.2d 1528 (10th Cir.), *cert. denied,* —— U.S. ——, 114 S.Ct. 81, 126 L.Ed.2d 49 (1993) (reprinted in the Appendix hereto at 17a-39a).

Christopher v. Mobil Oil Corp., 950 F.2d 1209 (5th Cir.), *cert. denied,* —— U.S. ——, 113 S.Ct. 68, 121 L.Ed.2d 35 (1992) (reprinted in the Appendix hereto at 40a-64a).

Mitchell v. Mobil Oil Corp., 896 F.2d 463 (10th Cir.), *cert. denied,* 498 U.S. 898, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

JURISDICTION

The judgment of the Colorado Court of Appeals in this case was entered on January 13, 1994. A petition for rehearing in the Colorado Court of Appeals was denied on February 10, 1994. (See Appendix D at 65a.) A timely petition for a writ of certiorari to the Colorado Supreme Court to review the opinion of the Colorado Court of Appeals was denied on August 29, 1994, over a dissent. (See Appendix E at 66a.) Pursuant to Colorado Appellate Rules 40 and 54(b) governing discretionary rehearing, petitioners timely filed a petition for rehearing with the Colorado Supreme Court, urging reconsideration of its denial of a writ of certiorari. The Colorado Supreme Court allowed the petition, and "[u]pon consideration" and "being sufficiently advised in the premises" thereof, denied the petition for rehearing on September 16, 1994. *See* Order of Court, Colorado Supreme Court (Appendix F at 68a). This petition is filed within 90 days of the Colorado Supreme Court's order of denial of rehearing. This Court has jurisdiction by virtue of 28 U.S.C. § 1257.

STATUTES INVOLVED

This petition involves the preemptive scope of Section 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a). Section 514(a) of ERISA supersedes "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan. . . ." (emphasis added). Other relevant sections of ERISA includes Sections 3(7), 502, and 510, 29 U.S.C. §§ 1002(7), 1132 and 1140, respectively.

STATEMENT OF THE CASE

This case presents the question of whether ERISA preempts petitioners' common law claims against respondent Mobil Oil Corporation (Mobil) for alleged fraudulent inducement to take "early retirement," when the Tenth Circuit Court of Appeals previously held on the same facts that petitioners, members of the plaintiff class certified in the federal action, lack standing to bring any ERISA claims because:

> (a) they are no longer "participants" in the pension plan within the meaning of ERISA, having taken the "full extent" of their vested pension benefits in a lump sum upon their early retirements; and thus
> (b) their claims "do not seek 'vested benefits improperly withheld.' "

Raymond v. Mobil Oil Corp., 983 F.2d 1528, 1532-37, *cert. denied*, —— U.S. ——, 114 S.Ct. 81, 126 L.Ed.2d 49 (1993) (Appendix at 24a-33a). According to the Tenth Circuit, when (a) and (b) above are found, the "existence of fraud is irrelevant" to the issue of standing under ERISA. *Raymond*, 983 F.2d at 1536 (Appendix at 32a).[1]

While acknowledging that ERISA preemption was not an issue in the petitioners' federal action, the Tenth Circuit in *Raymond* construed this Court's ERISA preemption holdings in *District of Columbia v. Greater Washington Bd. of Trade*, —— U.S. ——, 113 S.Ct. 580, 121 L.Ed.2d 513 (1992), and *Ingersoll-Rand v. McClendon*, 498 U.S. 113, 111 S.Ct. 478, 112 L.Ed.2d 356 (1990):

> Thus, this is not a case where the state law "specifically refers" to an ERISA plan, as in *Greater*

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[1] The Tenth Circuit's ruling was based on a construction of this Court's analysis of "participant" status under ERISA in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 S.Ct. 948, 958, 103 L.Ed.2d 80 (1989). *But see and compare, Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1220 (5th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 68, 121 L.Ed.2d 35 (1992) (Appendix at 40a, 58a).

> *Washington Bd. of Trade,* —— U.S. at ——, 113 S.Ct. at 585, nor even where the preempted claim is "premised on" the existence of an ERISA plan, as in *Ingersoll-Rand,* 498 U.S. at 140, 111 S.Ct. at 483. The state law claim in *Ingersoll-Rand* was a common law claim for wrongful discharge based upon the employer's desire to prevent the employee from vesting in his benefit plan. There is no such claim here. Rather, plaintiffs here simply allege a wrongful discharge, achieved through fraud. The fact that an ERISA plan was merely part of the means by which Mobil allegedly fraudulently procured plaintiffs' dismissal does not necessarily compel the conclusion under *Ingersoll-Rand* that the state law claim is "premised on" the existence of an ERISA-covered plan.

Raymond, 983 F.2d at 1539 n.14 (Appendix at 38a, n.14). The Tenth Circuit's "footnote 14" was to cited cases which represent the notorious "gap in remedies" supposedly created by ERISA preemption. *Id.* at 1538 (Appendix at 35a-36a). Although dicta, footnote 14 was offered to the state courts in this case as a principled theory to avoid the "gap in remedies" in wrongful discharge cases and to draw some limits of ERISA preemption in cases which assert neither claims for ERISA benefits nor claims for retaliation for exercising a plan right.

Rather than applying the Tenth Circuit's more acute analysis of ERISA preemption, however, the Colorado appellate court opted to embrace the more diffuse and "less stringent test [which] requires only that the state law claim have a *connection with* an ERISA plan." *Houdek*, 879 P.2d at 422 (Appendix at 8a) (emphasis added) (citing *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 718 (2nd Cir. 1993), *cert. granted*, United States Supreme Court, Nos. 93-1408, 93-1414 and 93-1415 (Order, October 11, 1994).[2]

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[2] The "connection with" test for ERISA preemption developed from *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97, 103 S.Ct. 2890,

FACTUAL AND PROCEDURAL BACKGROUND

Petitioners, named plaintiffs below, are members of the plaintiff class certified in *Raymond,* who originally asserted in *Raymond* both state law and ERISA claims seeking redress for the same alleged fraudulent transaction. The particulars as to how Mobil used information about proposed amendments to petitioners' ERISA pension plan as the "means" to effect their involuntary retirements are succinctly presented by the *Raymond* court, 983 F.2d at 1529-32 (Appendix at 18a-24a).

After their state-law claims in *Raymond* were dismissed without prejudice for lack of pendent jurisdiction (before 28 U.S.C. § 1367 became effective), plaintiffs reasserted six common law tort claims against Mobil in the District Court for the City and County of Denver. The crux of the claims is that Mobil fraudulently induced petitioners to take early retirement—to quit their jobs—on average, seven years before normal retirement age. Petitioners allege that Mobil misrepresented and concealed information about proposed amendments to their pension plan which confronted petitioners with a Hobson's choice: either retire now and take all of your vested pension benefits in one lump sum, or, remain employed but risk failing to meet new and more stringent eligibility requirements to qualify for the lump sum option.[3]

Because Mobil allegedly used information about plan amendments as the "means" to induce petitioners to quit

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77 L.Ed.2d 490 (1983), and was reiterated in both *Ingersoll-Rand,* 498 U.S. at 139, and *Greater Wash. Bd. of Trade,* —— U.S. ——, 113 S.Ct. at 583, 121 L.Ed.2d at 520. *See and compare, Raymond,* 983 F.2d at 1538 n.14 (Appendix at 36a) (citing and construing the "connection with" test); with *Christopher,* 950 F.2d at 1220 (Appendix at 58a) (applying a "connection to" standard).

[3] The federal complaint also asserted (unsuccessfully) violations of the Age Discrimination in Employment Act (ADEA). *See Raymond v. Mobil Oil Corporation,* 7 F.3d 184 (10th Cir. 1993), *cert. denied, sub nom. Morrison v. Mobil Oil Corporation,* —— U.S. ——, 114 S.Ct. 1070, 127 L.Ed.2d 388 (1994).

their jobs, the state law complaint is "replete" with references to the plan and ERISA. *See Houdek,* 879 P.2d at 419 (Appendix at 2a). Those references also related to a claim for civil conspiracy between Mobil and the Mobil Retirement Plan, which petitioners conceded below might well be preempted. However, any judgment upon the other claims would be against Mobil, not the Retirement Plan, and would not implicate any conduct of the Plan.

Because Mobil's alleged motive was to reduce its workforce, by wrongful means, and since petitioners took the full extent of their vested pension benefits upon their early departures, there is no allegation in the complaint that Mobil had a pension-defeating or retaliatory motive for its conduct.

This case was stayed by the Colorado state court while litigation proceeded in *Raymond* and in a Texas case brought by "opt-outs" from the Raymond class. The Texas case was *Christopher.* In *Christopher,* both the state law claims and the ERISA claims on the same alleged fraudulent transaction were considered by the federal courts. While the Fifth Circuit held the state law claims preempted because the "underlying conduct at issue here cannot be divorced from its connection to the employee benefit plan," 950 F.2d at 1220 (Appendix at 58a), the Fifth Circuit also determined that the plaintiffs could establish standing under ERISA if they proved Mobil's misconduct, because an employer "should not be able through its own malfeasance to defeat the employee's standing." 950 F.2d at 1221 (Appendix at 60a).[4]

Before *Christopher,* the jurisprudence of ERISA standing and ERISA preemption was uncertain. Petitioners recognized that the federal court in *Raymond* might follow

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[4] After remand and rulings on several issues (*see Christopher,* 149 F.R.D. 539 and 149 F.R.D. 549 (E.D. Tex. 1993), Mobil settled with the plaintiffs in the Fifth Circuit litigation.

the Fifth Circuit's decision on ERISA standing in *Christopher,* thus giving petitioners an ERISA cause of action. That would necessarily mean their state law claims would be preempted by implied or direct conflict preemption under ERISA.

Mobil, however, argued to the federal district court in *Raymond* that it should not follow the Fifth Circuit's reasoning on ERISA standing in *Christopher.* At the same time, Mobil argued to the state district court in this case that it should follow *Christopher* on ERISA preemption.

The district court in *Raymond* followed *Christopher* on ERISA standing but certified the ruling for interlocutory review by the Tenth Circuit under 28 U.S.C. § 1292(b). Before the appeal was briefed in the Tenth Circuit, however, the state district court in this case, citing *Christopher,* granted Mobil's motion to dismiss the state law claims on grounds of ERISA preemption. The Tenth Circuit subsequently declined to follow *Christopher* on ERISA standing and reversed the federal district court.

As noted, however, the Tenth Circuit also offered its studied analysis in footnote 14 of ERISA preemption. The Colorado Court of Appeals rejected both the Tenth Circuit's conclusion that the petitioners' state law claims "simply allege a wrongful discharge, achieved through fraud," and its observation that when an ERISA plan is "merely part of the means" by which an employer fraudulently procures an employee's discharge, the consequent state law claims do not have a "connection with" the ERISA plan nor are they "premised on" the plan. The Colorado Supreme Court denied a petition for a writ of certiorari, with a dissent.[5]

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[5] *See Order Of Court,* Supreme Court, State of Colorado, *Houdek v. Mobil Oil Corp.,* No. 94SC149 (August 29, 1994) (Mullarkey, J., dissenting, would grant on the following issue: "Whether the court of appeals erred in holding that plaintiffs state law claim alleging fraudulent inducement to quit employment is preempted

Petitioners realize that review in this case might result in the Court's determination that *Raymond,* and not this case, was wrongly decided. The Court might conclude that petitioners do have standing under ERISA and therefore the state-law claims in this case are directly preempted.[6] Thus, as members of the plaintiff class in *Raymond,* petitioners respectfully inform the Court that they are prepared to file a motion for leave to request rehearing of this Court's order denying the writ of certiorari to review *Raymond.*

REASONS FOR GRANTING THE WRIT

Petitioners have been denied their day in court, in any court—state or federal. All legal avenues to redress their alleged wrongful discharges have been closed without consideration of the merits. Assuming Congress intended to enumerate carefully the remedies available under ERISA, Congress by so doing did not intend to eliminate state law actions for fraud by aggrieved employees seeking damages from their former employer for wrongful termination. For such plaintiffs, ERISA does not "create a federal cause of action for wrongful discharge." *Raymond,* 983 F.2d at 1539 (Appendix at 38a). Neither should ERISA be construed to abolish their state cause of action for wrongful discharge. *See and compare, Hawaiian Airlines, Inc. v. Finazzo,* —— U.S. ——, 114 S.Ct. 2239, 2246, 129 L.Ed.2d 203 (1994) (federal Railway Labor Act does not preempt employee's claim for wrongful discharge when "the 'only source' of the right [plaintiff] asserts in this action is state tort law").

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by ERISA when the same plaintiffs lack standing to sue under ERISA and when their state law claim does not relate to an ERISA benefit plan.") (Appendix at 66a).

[6] *See Vartanian v. Monsanto Co.,* 14 F.3d 697, 702-03 and n.4 (1st Cir. 1994) (expressly rejecting *Raymond*); *Mullins v. Pfizer, Inc.,* 23 F.3d 663, 667-68 (2nd Cir. 1994) (expressly rejecting *Raymond*).

Between implied or direct conflict preemption of state law claims—because a plaintiff is entitled to bring an action under ERISA on the same facts—and express preemption of state law claims—because they "relate to" benefit plans—Congress did not intend to grant employers immunity from state law actions for wrongful discharge in which there are no allegations of pension-defeating or retaliatory motives. Congress did not intend to ensure the formation of benefit plans and the uniformity of benefit law at the expense of the states' common law at-will employment doctrines and the various exceptions thereto. *See e.g., Berger v. Security Pacific Information Systems, Inc.*, 795 P.2d 1380, 1383-84 (Colo. App. 1990) ("employer's right to terminate an at-will employee without cause does not protect the employer from liability for fraud" in an inducement impacting the employment relationship). The balance of interests struck by ERISA did not include the legitimation of tortious deception by employers.

Here, however, the Colorado Court of Appeals in effect has ruled that employers can dupe their employees out of their jobs simply by using an employee's ERISA plan as the efficient means to procure the "retirement." The employer can claim preemption to defeat the ensuing common law wrongful discharge claims and, under *Raymond*, avoid all possible claims under ERISA.

This is not an isolated scenario. In addition to states within the Tenth Circuit, all states within the Eleventh Circuit are now potential safe harbors for employer fraud. *See Sanson v. General Motors Corp.*, 966 F.2d 618, 623 (11th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 1578, 123 L.Ed.2d 146 (1993) (ERISA preemption of fraud claims and no ERISA standing) (Birch, J., dissenting) ("An employer in this circuit can now hoodwink a long time employee and leave him stranded without any recourse whatsoever."). *Sanson* was cited by the court below for the proposition that "the unavail-

ability of an ERISA cause of action does not necessitate the creation of a federal common law fraud claim in order to provide the plaintiff with a remedy." *Houdek*, 879 P.2d at 420 (Appendix at 4a-5a).[7]

This is the so-called "gap in remedies," which courts have created by narrowly construing ERISA's civil enforcement provisions while expansively construing ERISA's "relate[s] to" preemption. And the phenomenon is spreading. *See, e.g., Cutler v. Phillips Petroleum Co.*, 881 P.2d 216, 225 (Wash. 1994); *but see Menton*, 551 So.2d at 238; *see also*, n.7, *supra; see Pace v. Signal Technology Corp.*, 628 N.E.2d 20, —— (Mass. 1994) ("That a statute [ERISA] whose clear purpose was to benefit employees has become widely used as a shield to protect employers [from redress] for any deceptive and wrongful acts they may have committed against their employees is an irony we find unacceptable as a governing principle of law.") (no ERISA preemption of state law fraud claims against former employer who misrepresented plan benefits). *Pace* cannot be squared with the Colorado court's opinion here.

The opinion below also demonstrates how ERISA preemption is inexorably *federalizing* all employment law. Some state courts, in the absence of this Court's guidance, will foreseeably restrict the traditional avenues of redress for torts in the employment context, by increasing appli-

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[7] To its credit, Alabama, a constituent state of the Fourth Circuit, is resisting the *Sanson* court's construction of ERISA. *See HeathAmerica v. Menton*, 551 So.2d 235, 238 (Ala. 1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1166, 107 L.Ed.2d 1069 (1990) ("We hold that a claim for fraud in the inducement [to drop one and enroll in another ERISA benefit plan] does not 'relate to' an employee benefit plan and is therefore not preempted by ERISA."); confirmed, *Ingram v. American Chambers Ins. Co.*, 643 So.2d 575, 577-78 (Ala. 1994) (noting that "the Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits . . . do not agree about whether ERISA preempts a state law claim of fraud in the inducement") (collecting cases).

cation of federal preemption doctrine that lacks principled limitation. Review here would be the Court's opportunity to reverse this unintended displacement of state common law.

I. THE COLORADO COURT OF APPEALS ERRED IN HOLDING THAT COMMON LAW CLAIMS FOR ALLEGED TORTIOUS DISCHARGE ARE PREEMPTED BY ERISA EVEN WHEN PLAINTIFFS LACK STANDING TO BRING ERISA CLAIMS FOR THE SAME ALLEGED MISCONDUCT.

The Colorado Court of Appeals missed the significance of the Tenth Circuit's standing analysis between invocations of the "gap in remedies" doctrine:

> Plaintiffs first argue that because the federal court has determined that they do not have a viable claim for relief under ERISA, their state law claims cannot be preempted. The United States Court of Appeals for the Tenth Circuit found that the definition of a participant entitled to bring a cause of action under ERISA excludes former employees, such as plaintiffs here, who have received the full extent of their benefits in a lump sum payment and who do not have either a colorable claim to further benefits or a reasonable expectation of returning to employment covered by the retirement plan. We do not agree that the existence of a viable ERISA claim is a prerequisite to preemption.

Houdek, 879 P.2d at 420 (Appendix at 4a) (citations omitted). The first sentence attributes to petitioners an argument they did not make. The third sentence is therefore beside the point. The second sentence *is* the point: plaintiffs had no standing to bring any claims under ERISA because the wrong they allege is a discharge that itself defeats their standing under ERISA (at least in the Tenth Circuit). Why should the discharge be immunized by ERISA from any claims under state law when it was achieved by misconduct with no attendant pension-defeating or retaliatory motives?

This Court's decision in *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), is the first case invoked by the court below, 879 P.2d at 420 (Appendix at 4a), but *Pilot Life* does not support the preemption of petitioners' state law claims in this case. In *Pilot Life,* the plaintiff was a current beneficiary who brought common law claims "asserting improper processing of a claim for benefits under an insured employee benefit plan." 481 U.S. at 43. The plaintiff sought not only recovery of benefits, but also damages for emotional distress and punitive damages. This Court, while holding that claims for such damages were preempted by ERISA, also noted that ERISA claims were available to the plaintiff. *Id.* at 44. Unlike the petitioners here, who lack ERISA standing and who are not seeking benefits, the plaintiff in *Pilot Life* had standing under ERISA to recover lost benefits, and the fact that ERISA does not provide a remedy for infliction of emotional distress or allow punitive damages for improper processing of benefits, was irrelevant to the preemption of those "extra" claims.[8]

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[8] *See Caterpillar Inc. v. Williams,* 482 U.S. 386, 391 n.4, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (" 'The nature of the relief available after jurisdiction attaches is, of course, different from whether there is jurisdiction to adjudicate the controversy.' ").

The court below also relied on *Corcoran v. United Healthcare, Inc.,* 965 F.2d 1321 (5th Cir. 1992). There, defendants removed the action from state court. The Fifth Circuit found that because the alleged misconduct by defendant plan administrator "involv[ed] benefit determinations," *id.* at 1332, state law claims for that misconduct were preempted. Standing was not an issue. The "gap in remedies" noted by the Fifth Circuit should not occur in cases where alleged misconduct by a defendant employer is limited to wrongful discharge and does not require a determination of benefits. Similarly, in *Lister v. Stark,* 890 F.2d 941 (7th Cir. 1989), also cited by the court below, the plaintiff originally sued in state court, seeking state law remedies for an alleged improper calculation of benefits. Again, standing was not an issue. The state claims were found to be preempted by ERISA upon defendant's

Here, in contrast, petitioners seek to recover damages from their former employer for fraudulently inducing them to quit their jobs. ERISA is not a "federal job protection scheme." *Raymond*, 983 F.2d at 1539 (Appendix at 38a), and because petitioners have received the full extent of their plan benefits and do not have a colorable claim for further benefits, their consequent lack of standing under ERISA is highly significant to the preemption question. Where, as here, plaintiffs lack standing to sue under ERISA *because* the defendant's conduct is entirely outside ERISA (i.e., is not sufficiently "related to" the plan), thoughtlessly extending the "gap in remedies" by preempting state law claims serves none of the purposes of preemption. There is no legitimate and certainly no congressionally intended purpose served by the "gap" in this context.

The Fourth Circuit Court of Appeals recognized the significance of lack of standing to preemption. In *Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444, 446 (4th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 1401, 128 L.Ed.2d 74 (1994), the court held that in order for state law claims to be preempted, a plaintiff "must have standing to sue" under ERISA. The court below cited *Madonia*, but inexplicably ignored the Fourth Circuit's test for preemption in the "no standing" context. *See also, Harris v. Provident Life and Acc. Ins. Co.*, 26 F.3d 930, 934 (9th Cir. 1994) ("It would be contradictory to rule that state law claims are preempted where the court has already held that the same plaintiffs may not assert a claim under ERISA because they are not 'participants' in the ERISA plan.").

While *Raymond* acknowledges that a "gap in remedies" could occur in some circumstances, it took great pains to explain why no "gap" should occur here. The court below simply did not appreciate the significance of the

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removal to federal court. The reason that plaintiff there was left without a remedy was that "no federal cause of action explicitly appear[ed] on the face of his complaint." *Id.* at 944.

explanation: standing to bring any ERISA claim for a wrongful discharge and ERISA preemption of all common law claims for the same discharge are mutually exclusive determinations. Either the discharge and the plaintiff's means to remedy it are within ERISA, or they are beyond ERISA's preemptive reach. The "gap in remedies" may be a "necessary evil" in some cases, but that does not justify a gap in cases where it is not necessary. This Court should decide whether the relation between ERISA standing and ERISA preemption deserves a more principled treatment than it received by the court below.

II. THE COLORADO COURT OF APPEALS ERRED IN HOLDING THAT STATE LAW CLAIMS FOR ALLEGED FRAUDULENT INDUCEMENT TO RETIRE EARLY "RELATE TO" THE ERISA PLAN, AND ARE THUS PREEMPTED, WHEN THE SOLE "CONNECTION" BETWEEN THE STATE CLAIMS AND THE PLAN IS THAT INFORMATION ABOUT PROPOSED PLAN AMENDMENTS WAS USED AS THE "MEANS" TO INDUCE THE INVOLUNTARY RETIREMENTS.

Colorado's common law of fraud does not purport to regulate the terms and conditions of ERISA benefit plans. It does not refer to plans or plan benefits. The common law of fraud predated ERISA and obviously is not premised on the existence of ERISA plans. By the state law fraud claims brought below, petitioners seek relief for wrongful discharge. Petitioners do not seek pension benefits withheld, nor do they allege that plan benefits were erroneously calculated, nor that the plan amendments were improper under ERISA. Contrary to the holdings below, the only command which would have been imposed on Mobil by the operation of the common law here would be to not use information *about* pension plans to deceive employees into quitting their jobs. Such a command leaves undisturbed the full operation of all the statutory policies and regulatory purposes of ERISA and does not, contrary to the lower court's decision here, implicate any disclosure requirements under ERISA.

Petitioners contend that apart from the link between standing and preemption, when an employer uses communications to its employees about pending plan amendments to induce them to quit their jobs, taking their vested pension benefits in a lump sum, the state law claim consequent upon discovery of the alleged misconduct cannot "relate to" the benefit plan within the meaning of ERISA. When information about an ERISA plan is used as the "means" to effectuate an injury to which ERISA is not addressed, the "connection with" the plan is neither the kind nor the degree of connection which warrants preemption. That is, the state law claims have at most "a 'tenuous, remote, or peripheral' connection" with the plan. *Raymond,* 983 F.2d at 1538 n.14 (Appendix at 37a-38a n.14) (*citing Greater Washington Bd. of Trade,* —— U.S. —— n.1, 113 S.Ct. at 583 n.1).

The court below, *citing Ingersoll-Rand* and *Travelers Insurance Co. v. Cuomo,* 14 F.3d 708 (2d Cir. 1993), in the same breath, construed both cases to stand for "a less stringent test" for state courts exercising "even common law powers of general application." *Houdek,* 879 P.2d at 422 (Appendix at 7a-8a). That test, of course, is none other than the "connection with" standard, which alone offers no greater direction to the courts than the original "relate[s] to" language of the statute. Petitioners urge that it is the "quality" of the connection which should be considered. When the sole "connection" is that plan information was used only as the means to cause a harm not cognized by ERISA, then the requisite quality of the connection warranting preemption is missing.

In applying its "less stringent" version of the "connection with" standard, the court below distorted the analysis of preemption in *Ingersoll-Rand* itself. There, in Part II A, this Court had no difficulty in concluding that "a claim that the employer wrongfully terminated plaintiff primarily because of the employer's desire to avoid contributing to, or paying benefits under, the employee's pen-

sion fund" "relate[s] to" the pension plan and is therefore preempted. *Ingersoll-Rand,* 498 U.S. at 140. Thus, the *sine qua non* of express preemption of the wrongful discharge claim was the employer's motive to prevent pension benefits from vesting and/or to cease contributing to the pension plan. Plaintiff had to plead that "an ERISA plan exists *and* the employer had a pension-defeating motive." *Id.* (emphasis added).

The teaching of *Ingersoll-Rand* is that it is the employer's pension-defeating motives which "connect" the ensuing discharge claim with the plan. It is not the choice of "means" used by the employer to effect the discharge nor the remedies sought by the discharged employee which determines the "connection" to the plan. This is confirmed by the analysis of implied or direct conflict preemption in Part II B of *Ingersoll-Rand.* The Court there held that the plaintiff's claim was also preempted because "it conflicts directly with an ERISA cause of action." 498 U.S. at 142. That is, the plaintiff's claim fell "squarely within the ambit of ERISA § 510" [29 U.S.C. § 1140], which among other things prohibits an employer from discharging an employee/participant " 'for the purposes of interfering with the attainment of any right to which the participant may become entitled under the plan.' " *Id.* That is not this case at all.

This Court concluded *Ingersoll-Rand* by holding that "it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits." *Id.* at 145. It is no answer to a "direct conflict" preemption argument. That is, if a state law claim is bottomed on the fact that the employer interfered with the attainment of a right under the plan—e.g., preventing pension benefits from vesting—then it makes no difference whether the discharged employee elects to recover pension benefits. The claim is preempted, regardless of the remedies sought, because the employee has a direct cause of action under ERISA. Thus, on a claim for wrongful dis-

charge, the fact that the plaintiff does not seek to recover benefits is irrelevant to the operation of "direct conflict" preemption. However, on a claim for wrongful discharge where the plaintiff does not seek benefits *and* makes no allegations of pension-defeating motives on the part of the employer, there is no basis or reason for "relate[s] to" preemption.[9]

Here, petitioners neither seek benefits nor allege that Mobil had any pension-defeating motives. Those facts were found by the Tenth Circuit in its determination that petitioners lack standing under ERISA. Thus, petitioners' claims for fraudulent discharge do not "relate to" the pension plan under the principles established by *Ingersoll-Rand* in cases of wrongful discharge. The court below, however, obscured the rationales of *Ingersoll-Rand* with an easy "connection with" treatment of petitioners' case that left them without any legal recourse whatsoever. This case is not, then, just another example of the necessary "gap in remedies" under ERISA. Rather, according to the court below, it is an example of a gap with no purpose or rationale. It is a gap which this Court should close.

III. CONGRESS DID NOT INTEND TO CREATE A SAFE HARBOR FOR UNLAWFUL EMPLOYER CONDUCT THROUGH A CONJUNCTION OF BROAD ERISA PREEMPTION AND NARROW ERISA STANDING.

"The question of whether a certain state action is preempted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone." *Ingersoll-Rand,* 498 U.S. at 137-38 (internal quotations omitted). These precepts have been reiterated by this

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[9] *Compare Caterpillar,* 482 U.S. at 396 n.10 (1987) (no federal preemption under the Labor Management Relations Act, for example, of "a state battery suit growing out of a violent strike . . . simply because the strike may have been a violation of an employer-union contract").

Court and other courts. Those precepts are conspicuous by their absence in the court's opinion below. A touchstone is a "test or criterion for determining the quality or genuineness of a thing." Webster's Ninth New Collegiate Dictionary (1991). If the intent of Congress is the "ultimate touchstone," then it is the "last test" for determining the propriety of preemption.

Petitioners contend that the "last test" should not be given mere lip service at the beginning of a preemption analysis, but should be applied, as its name suggests, at the end of the analysis. Upon reaching a tentative result in a preemption case, here the preemption of petitioners' state law claims for fraudulent discharge, the court should measure that result against the intent of Congress. More importantly, this Court should measure the real consequence of the court's holding below. Petitioners respectfully submit that no reasoning, even that which begins with the text of the statute, can square this total denial of legal process with the intent of Congress.

CONCLUSION

For these reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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December 13, 1994

APPENDICES

APPENDIX A

COLORADO COURT OF APPEALS
DIV. V

Nos. 92CA1395, 93CA0062

HAROLD A. HOUDEK, FREDERIC J. RAYMOND, J.A. MORRISON, GEORGE H. LIVERIS, ROBERT A. IRWIN, CECIL J. ALLMON, JOSE AUGUSTO, JR., R.S. BANNER, JR., A.D. BOND, CLEMONT H. BRUCE, HARVEY A. CARSON, JR., BILLY JACK DUNN, VIRGINIA HOWARD, SYLVESTER J. JAYE, T.L. MARTIN, IRA S. REAVIS, E. SHEPARD, HERMAN B. THOMASON, MARION LEON THOMPSON, BILLY RHEA SARGENT, and CLARENCE E. WHITE, for themselves and on behalf of others similarly situated,

Plaintiffs-Appellants,

v.

MOBIL OIL CORPORATION, a New York Corporation, the RETIREMENT PLAN OF MOBIL OIL CORPORATION, itself and by the Trustees thereof, and one or more JOHN and/or JANE DOES and/or DOE ENTITIES,

Defendants-Appellees.

Jan. 13, 1994

Rehearing Denied Feb. 10, 1994

Certiorari Denied Aug. 29, 1994

Opinion by Judge DAVIDSON.

In this action to recover damages for common law fraud, negligent misrepresentation, civil conspiracy, and

interference with contract, plaintiffs, Harold A. Houdek, Frederic J. Raymond, J.A. Morrison, George H. Liveris, Robert A. Irwin, Cecil J. Allmon, Jose Augusto, Jr., R.S. Banner, Jr., A.D. Bond, Clemont H. Bruce, Harvey A. Carson, Jr., Billy Jack Dunn, Virginia Howard, Sylvester J. Jaye, T.L. Martin, Ira S. Reavis, E. Shepard, Herman B. Thomason, Marion Leon Thompson, Billy Rhea Sargent, and Clarence E. White, appeal from the judgment dismissing, pursuant to C.R.C.P. 12(b)(5), their complaint against defendants, Mobil Oil Corporation (Mobil), the Retirement Plan of Mobil Oil Corporation, and the trustees thereof. We affirm.

Plaintiffs are former employees of defendant Mobil. All plaintiffs were participants in a retirement plan governed by the federal Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, et seq. (1988) (ERISA).

According to the complaint, which is comprised of twenty-two pages replete with references to ERISA regulations and allegations regarding the administration of the retirement plan, beginning in 1977, Mobil made available a retirement plan option known as the "lump sum" under which eligible employees could elect to receive retirement account funds in a single payment rather than in monthly annuity payments. The complaint alleged that, in mid-1984, Mobil announced to its employees that the eligibility threshold for the lump sum option, which was based upon an employee's total net worth or total accrued pension, would be raised and that in order to take advantage of the lump sum option at the lower threshold, they must retire before January 1, 1985. Plaintiffs are all employees who chose to retire before January 1, 1985, and who selected the lump sum option.

The complaint further alleges that Mobil knew before January 1, 1985, but did not inform its employees that, because of certain federal tax considerations, it would not be able to implement the higher eligibility threshold without also implementing a waiver provision for that thresh-

old and that, because of then recent amendments to ERISA (known as the Retirement Equity Act), plaintiffs would have been entitled to the lump sum option under the lower threshold even if they had retired after January 1, 1985. Plaintiffs aver that they would not have retired before January 1, 1985, but for Mobil's representations that their entitlement to the lump sum option under the lower threshold would be foreclosed after that date and that they could not have qualified for the lump sum option under the higher threshold.

Plaintiffs filed suit in federal district court for the District of Colorado asserting claims under the federal Age Discrimination in Employment Act (ADEA) and ERISA as well as various state law claims. The federal court declined to exercise pendent jurisdiction over the state law claims and dismissed those claims without prejudice. Plaintiffs then refiled the state law claims by way of this action in the trial court.

Defendants moved for dismissal under C.R.C.P. 12(b)(5) on the grounds that plaintiffs' state law claims were preempted by the federal ERISA legislation. The trial court granted defendants' motion and subsequently awarded attorney fees to defendants pursuant to § 13-17-201, C.R.S. (1987 Repl.Vol.6A).

The federal district court held that plaintiffs had viable ERISA claims. That determination was reversed on appeal by the Tenth Circuit Court of Appeals on the grounds that plaintiffs were no longer participants in an ERISA plan. The Tenth Circuit opinion did not address plaintiffs' ADEA claims. *See Raymond v. Mobil Oil Corp.*, 983 F.2d 1528 (10th Cir.1993).

I.

Plaintiffs contend that the trial court erred in determining that their state law claims were preempted by federal ERISA legislation. We disagree.

A.

Plaintiffs first argue that because the federal appeals court has determined that they do not have any claim for relief under ERISA, their state law claims cannot be preempted. The United States Court of Appeals for the Tenth Circuit found that the definition of a participant entitled to bring a cause of action under ERISA excludes former employees, such as plaintiffs here, who have received the full extent of their benefit in a lump sum payment and who do not have either a colorable claim to further benefits or a reasonable expectation of returning to employment covered by the retirement plan. *Raymond v. Mobil Oil Corp., supra*; *see also Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.1990). We do not agree that the existence of a viable ERISA claim is a prerequisite to preempton.

According to federal and United States Supreme Court cases interpreting the scope of ERISA preemption, state law tort claims which conflict directly with a viable ERISA cause of action are preempted by ERISA. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). The converse, however, that a viable ERISA claim is necessary in order for preemption to apply, has been expressly and uniformly rejected by the federal appellate courts. *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (Congress did not intend for remedies which it had rejected in ERISA to become available under state law claims); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir.1992) ("While we are not unmindful of the fact that our interpretation of the preemption clause leaves a gap in remedies within a statute intended to protect participants in employee benefit plans, the lack of an ERISA remedy does not affect a preemption analysis."); *cf. Sanson v. General Motors Corp.*, 966 F.2d 618 (11th Cir.1992) (the unavailability of an ERISA cause of action does not necessitate the

creation of a federal common law fraud claim in order to provide the plaintiff with a remedy).

Nonetheless, plaintiffs contend that under Colorado law their claims cannot be preempted. They base this contention on the statement by this court in *Pierce v. Capitol Life Insurance Co.*, 806 P.2d 388, 390 (Colo.App. 1990) that "[i]n order for a plaintiff's state law [tort] claim to be preempted, he or she must be entitled to bring an ERISA claim." Plaintiffs misapprehend the significance of this phrase.

Contrary to plaintiffs' contentions, *Pierce* does not hold that the lack of an ERISA claim prevents preemption of state law claims. The issue before the court in *Pierce* was whether the plan covering plaintiffs, the husband and wife owners of a small business, was an employee benefit plan covered by ERISA in the first instance pursuant to federal regulations, codified at 29 C.F.R. § 2510.3-3 (1989), which define "employee" to exclude such husband and wife owners. The court thus concluded that "the plaintiff must have been a 'participant' or 'beneficiary' of [an ERISA] plan" before ERISA is even applicable. *Pierce v. Capitol Life Insurance Co., supra*, at 390; *see Madonia v. Shield of Virginia*, 11 F.3d 444 (4th Cir.1993) (29 C.F.R. § 2510.3-3 applies only to the initial determination that an employee plan exists and does not govern whether a person is a plan participant once the existence of an ERISA plan has been established as it would be anomalous to allow two disparate sets of legal obligations to pertain to persons covered by the same ERISA plan).

Thus, the holding in *Pierce* is limited to situations in which ERISA is not applicable because the plaintiffs never participated in an ERISA covered plan. Unlike the plaintiffs in *Pierce*, plaintiffs here were at one time participants in the ERISA covered Mobil retirement plan.

Plaintiffs urge this court to adopt the reasoning of *Cutler v. Phillips Petroleum Co.*, 71 Wash.App. 511, 859

P.2d 1251 (1993), in which the court commented in dicta that if a party has no ERISA claims, state law claims must be available in order to ensure a forum in which to air grievances. We do not find that reasoning persuasive in light of express determination by the federal appellate courts that, absent a clear directive to the contrary from the United States Supreme Court, the existence of an ERISA remedy is not a prerequisite for ERISA preemption. *See Lister v. Stark*, 890 F.2d 941 (7th Cir.1989); *see also Pilot Life Insurance Co. v. Dedeaux, supra; cf. Caterpillar Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (rejecting the notion that a federal remedy is a prerequisite to complete preemption under the federal Labor Management Relations Act of 1947).

B.

Plaintiffs next argue that ERISA does not preempt their state law claims because these claims do not relate to the ERISA plan. Again, we disagree.

ERISA expressly preempts any and all state laws insofar as they relate to any employee benefit plan covered by ERISA. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987); 29 U.S.C. § 1144(a) (1988). This is so even if the state law was not specifically designed to affect employee benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983); *see also Belgard v. United Airlines*, 857 P.2d 467 (Colo.App. 1992) (The term "relate to" as used in several federal statutes, including ERISA, was intended to be broadly construed).

The preemptive power of ERISA is broad enough to displace all state laws within its sphere, even those which are consistent with ERISA's substantive guidelines, because even indirect state action may encroach upon the area of exclusive federal concern. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985). Therefore, if a state

law cause of action makes specific reference to, or is premised upon, the existence of an ERISA covered plan, it is preempted. *Ingersoll-Rand Co. v. McClendon, supra.* Likewise, if, in order to prevail, the plaintiff has to prove the existence of an ERISA plan and misrepresentations by the employer as to the plaintiff's eligibility for benefits, state law claims are preempted. *See Sanson v. General Motors Corp., supra.*

Although interpreted broadly, this preemption clause does have recognized limits. *Ingersoll-Rand Co. v. McClendon, supra.* Some state actions affect employee benefits plans too tenuously, remotely, or peripherally to warrant preemption of those actions. *Shaw v. Delta Air Lines, Inc., supra.* If there is no impact, directly or indirectly upon an ERISA plan, the state law cause of action does not "relate to" the plan. *See Cutler v. Phillips Petroleum Co., supra.*

State law claims which provide an alternative cause of action for the collection of ERISA benefits, refer specifically and apply solely to ERISA plans, or interfere with the calculation of ERISA benefits, have been preempted. *See Monarch Cement Co. v. Lone Star Industries, Inc.*, 982 F.2d 1448 (10th Cir.1992). Plaintiffs correctly point out that, conversely, state laws of general application representing traditional exercises of state power or regulatory authority previously often have escaped preemption if their effect on the structure, administration, or type of benefits provided by an ERISA plan was merely incidental. *See Aetna Life Insurance Co. v. Borges*, 869 F.2d 142 (2d Cir.1989).

The United States Supreme Court, however, has rejected the argument that *only* state laws affecting plan terms, conditions, or administration are preempted. The Court reasoned that state courts, implementing even common law powers of general application, might develop dissimilar standards regarding the same conduct which would require multi-state employers to tailor retirement

plans to the peculiarities of each jurisdiction. *Ingersoll-Rand Co. v. McClendon, supra.* This less stringent test requries only that the state law claim have a connection with an ERISA plan. *See Travelers Insurance Co. v. Cuomo,* 14 F.3d 708 (2d Cir.1993).

As we read *Ingersoll-Rand,* in order to determine if plaintiffs' state law claims are preempted here, we must focus not only on the effect, or potential effect on plan terms, conditions, or administration, but also must consider whether allowing the state law claims to proceed would be likely to result in the creation of variable standards for employer conduct. *See Madonia v. Shield of Virginia, supra* (The statutory purpose of ERISA's preemption provision is to ensure similar treatment for all claims relating to employee benefit plans).

Under the proper analysis, we must consider whether the claim arises under a law representing a traditional exercise of state authority, whether invoking the state law would affect relations between the principal ERISA entities involved, and whether the state law claims would have only an incidental effect on the ERISA plan. But, these factors are not exhaustive and no one factor is dispositive. *See Van Camp v. AT & T Information Systems,* 963 F.2d 119 (6th Cir. 1992).

Thus, on the one hand, for example, state law claims for fraud have not been preempted if the fact that the subject of the alleged deception is pension plan benefits was not essential to the cause of action. *See Greenblatt v. Budd Co.,* 666 F.Supp. 735 (E.D.Pa.1987); *Cutler v. Phillips Petroleum Co., supra* (The gravamen of the plaintiffs' claim was that Phillips Petroleum misrepresented an agreement with successor company to maintain plaintiffs' salary and benefits, and therefore, the claim did not depend upon the existence of the ERISA plan and its effect upon the plan would be incidental).

Here, on the other hand, the existence and administration of the retirement plan do not bear merely an inci-

dental relationship to the allegations forming the core of plaintiffs' claims for relief. In their lengthy complaint, plaintiffs charge, *inter alia*, that Mobil represented that the change in eligibility requirements for the lump sum benefit was necessary to make the retirement plan cost competitive and to update the eligibility threshold to adjust for inflation when in actuality the changes would not make the retirement plan more cost competitive, the changes were not necessary since the retirement plan was already overfunded, and Mobil knew that the changes would probably violate existing Internal Revenue Service policy.

From these allegations, we conclude that the adjudication of plaintiffs' claims that they were fraudulently induced to take early retirement would involve examining, at a minimum, the operation and funding of the retirement plan prior to the eligibility changes, the language of the amendments to the retirement plan, and Mobil's communication to plaintiffs concerning the terms of the retirement plan amendments. We are unable to discern how a court could determine the merits of these claims without engaging in a close analysis of the details of the operation of the Mobil retirement plan. *See Berger v. Edgewater Steel Co.*, 911 F.2d 911 (3d Cir. 1990); *Anglund v. American Telephone & Telegraph Co.*, 828 F.Supp. 809 (D.Colo. 1993).

In a case filed in federal district court for the Eastern District of Texas by other Mobil employees alleging the same facts and the same misrepresentations by Mobil concerning the same retirement plan, the United States Court of Appeals for the Fifth Circuit determined that plaintiffs' identical state law claims were preempted in their entirety because "the basis of the claims themselves is the operation of the pension plan; if [the] claims were stripped of their link to the pension plans, they would cease to exist." *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1220 (5th Cir.1992). Thus, the court concluded,

under *Ingersoll-Rand*, the plaintiffs claims were premised upon an ERISA plan and were preempted. *See Christopher v. Mobil Oil Corp., supra.*

Specifically, of particular importance to plaintiffs' state law claims is the timing of notice to Mobil employees of the amendments to the retirement plan. As defendants point out, ERISA prescribes the period in which the plan administrator must disclose retirement plan amendments to affected employees. *See* 29 C.F.R. §§ 2520.104b-1, 2520.104b-3, and 2520.104b-4 (1992). ERISA also governs the adequacy of disclosures. *See* 29 C.F.R. § 2520.101-1, et seq. (1992); 29 U.S.C. § 1024(b) (1988); *see also Lee v. E.I. DuPont de Nemours & Co.*, 894 F.2d 755, 758 (5th Cir.1990) ("[T]he plaintiffs' action would impose a state-created duty on the part of pension fund administrators to disclose plan amendments before they are put into effect, a duty which at least one other circuit has said ERISA specifically does not impose.").

We agree with defendants that this aspect of plaintiffs' claims would have a more than incidental effect upon the manner in which the ERISA plan is administered in terms of disclosure requirements which could potentially interfere with the maintenance of a uniform body of federal regulation. *See Ingersoll-Rand v. McClendon, supra; Van Camp v. AT & T Information Systems, supra.*

Plaintiffs argue that the actions complained of were taken by Mobil as an employer only, and therefore, none of these ERISA regulations applies. In their complaint, however, plaintiffs allege, *inter alia*, that: "Per Article 16, Section 1 of the Plan, the Vice-President of Employee Relations and the Treasurer of Mobil are named fiduciaries *charged with the operation and administration of the Plan* (emphasis added)." From their allegations we must infer that Mobil, acting through certain of its officers and employees, is the "plan administrator" for purposes

of compliance with ERISA's disclosure requirements. *See* 29 U.S.C. § 1002(16) (1988).

Even if we assume that Mobil was acting solely in its capacity as employer when the alleged tortious conduct occurred, determinations concerning the propriety of the disclosures made by Mobil could be made only with reference to ERISA and would affect the relations among plaintiffs, Mobil, and the Mobil retirement plan as the principal ERISA entities involved. *See Van Camp v. AT & T Information Systems, supra.*

Plaintiffs rely upon *Raymond v. Mobil Oil Corp., supra,* in support of their argument to the contrary. In a footnote, the *Raymond* court opined that, arguably, plaintiffs' state law fraud claims allege simply a wrongful discharge achieved by the employer through fraud and are not premised upon the existence of an ERISA plan. This statement, however, was based upon a perfunctory evaluation of whether the claims would have an effect on the structure, administration, or type of benefits provided by the Mobil retirement plan. As we have noted, this type of inquiry is, at best, incomplete. *See Ingersoll-Rand Co. v. McClendon, supra.*

Additionally, the court there acknowledged that preemption was not an issue in the case; therefore, there is no basis for us to presume that the preemption question was thoroughly argued by the parties or analyzed by the court. *See Petrafeck v. Industrial Commission,* 191 Colo. 566, 554 P.2d 1097 (1976); *Dunbar v. Board of Trustees,* 170 Colo. 327, 461 P.2d 28 (1969).

In further support of their argument against preemption, plaintiffs contend that, the above analysis notwithstanding, the issue here is simply whether, once having communicated to its employees concerning the proposed amendments, Mobil had common law obligations as an employer to provide additional information to avoid misleading its employees. Mobil's compliance with ERISA

in making plan amendment disclosures, they maintain, is not in question. It is not difficult to see, however, that individual states could impose individual common law disclosure requirements as to the timing and content of plan related announcements which would quickly erode the intended comprehensive uniformity of applicable federal law. *See Ingersoll-Rand v. McClendon, supra; Christopher v. Mobil Oil Corp., supra; see also Cefalu v. B.F. Goodrich Co.,* 871 F.2d 1290 (5th Cir.1989) (ERISA preemption was intended to eliminate the threat of potentially conflicting and inconsistent state and local regulation of pension plans).

In addition, as plaintiffs conceded at oral argument, under the civil conspiracy claim, the Mobil plan is joined as a defendant and for this reason alone we must find that claim is preempted. The interference with contract claim also depends entirely for its existence upon the retirement plan as it is the employees' rights under the plan which they allege have been tortiously obstructed by the conduct of Mobil, a principal actor in the administration of the plan.

Therefore, although the state law claims asserted here represent typically significant functions of state law not designed specifically to affect pension plans, *see Provience v. Valley Clerks Trust Fund,* 509 F.Supp. 388 (E.D.Cal. 1981), the claims are nonetheless preempted because they would have more than an incidental effect upon the ERISA plan or upon relations among the principal ERISA entities involved. *See Van Camp v. AT & T Information Systems, supra.*

II.

Plaintiffs also contend that the trial court erred in awarding defendants attorney fees under § 13-17-201. We perceive no error in either the award or in the amount awarded.

A.

Plaintiffs assert that § 13-17-201 does not apply to their state law claims because they do not allege any death or injury to person or property. We disagree.

Section 13-17-201 provides for an award of reasonable attorney fees:

> In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any person, where any such action is dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure. . . .

By enacting § 13-17-201, the General Assembly intended to discourage unnecessary litigation of tort claims; therefore, this statute applies whenever a tort action is dismissed prior to trial pursuant to a motion under C.R.C.P. 12(b). *First Interstate Bank v. Berenbaum,* 872 P.2d 1297 (Colo.App.1993); *Employers Insurance of Wausau v. RREEF USA Fund-II (Colorado), Inc.,* 805 P.2d 1186 (Colo.App.1991).

Contrary to plaintiffs' contentions, the statute neither explicitly nor implicitly contemplates the existence of some manner or degree of physical harm to a person or to property. We are not persuaded that the statute is limited in applicability to a "species" of tort claims and is inapplicable to a tort claim which alleges only economic injury.

B.

Plaintiffs also argue that § 13-17-201 does not apply to their claims which they contend were brought in a good faith attempt to establish new law in Colorado. We do not agree that the applicability of § 13-17-201 is so limited.

Plaintiffs assert that § 13-17-201 creates disharmony with § 13-17-102(7), C.R.S. (1987 Repl.Vol. 6A) which provides that:

> No attorney or party shall be assessed attorney fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Colorado.

If two statutes conflict, the provisions of the specific statute will control over the general, and the provisions of the statute enacted last in time will control over one enacted earlier. *L.D.G. v. E.R.*, 723 P.2d 746 (Colo. App.1986). Section 13-17-201 is more specific as it applies only to tort actions which are dismissed pursuant to C.R.C.P. 12(b). Section 13-17-201 was enacted in 1987, *see* Colo. Sess.Laws 1987, ch. 100 at 547, later in time than § 13-17-102(7) which was enacted in 1977. *See* Colo.Sess.Laws 1977, ch. 107 at 460.

The mandatory attorney fees award provision of § 13-17-201 contains no express exclusion for claims brought in a good faith attempt to establish a new rule of law in Colorado. Thus, to the extent that § 13-17-201 and § 13-17-102(7), are in conflict, we conclude that § 13-17-201 controls, and the trial court did not err in awarding defendants their fees on that basis. *Cf. Shaw v. Baesemann*, 773 P.2d 609 (Colo.App.1988).

C.

Alternatively, plaintiffs argue that § 13-17-201 should not have been applied to their claims because they conditionally offered to confess defendants' motion to dismiss. Because the record does not support this contention, we disagree.

In response to defendants' motion to dismiss, plaintiffs filed a pleading with the trial court captioned "Plaintiffs' Partial Opposition to and Partial Conditional Confession of Defendants' Motion to Dismiss and Plaintiffs' Cross Motion for Stay of Procedeings until Conditions for Dismissal may be Satisfied." In that pleading they conceded

that, if they had a claim for relief in federal court under ERISA, their state court claims would be preempted as directly conflicting with that cause of action. As to express preemption under the terms of the federal ERISA legislation, however, plaintiffs maintained throughout this litigation that preemption on those grounds did not apply.

By implication, § 13-17-201 allows a plaintiff to escape liability for attorney fees by seeking a voluntary dismissal or by filing a stipulation of dismissal, or by confessing to a defendant's motion to dismiss under C.R.C.P. 12(b). *Employers Insurance of Wausau v. RREEF USA Fund-II (Colorado), Inc., supra.*

Plaintiffs here, in contrast, sought to maintain their state law claims unless and until the federal court reached a determination that they had a federal ERISA cause of action. In an attempt specifically to preserve the state court litigation, they argued that express statutory preemption did not apply. This is quite distinct from a confession to a C.R.C.P. 12(b) dismissal motion which would have ended the state court lawsuit entirely. *Cf. First Interstate Bank v. Berenbaum, supra* (Section 13-17-201 operates only when an entire action has been dismissed).

D.

Lastly, plaintiffs contend that the trial court awarded an excessive amount of attorney fees to defendants because much of the briefs filed in the motion to dismiss were redundant of briefs filed in federal cases concerning the same set of facts and issues. We perceive no abuse of discretion.

If an award of attorney fees is supported by the record, it will not be disturbed on appeal. *In re Conservatorship of Roth,* 804 P.2d 265 (Colo.App.1990); *see also In re Marriage of Hahn,* 628 P.2d 175 (Colo. App.1981). A determination that the amount requested for such an award is reasonable is a question of fact for the trial

court and will be upheld on appeal unless patently erroneous. *Spensieri v. Farmers Alliance Mutual Insurance Co.*, 804 P.2d 268 (Colo.App.1990).

Here, the trial court held a hearing on the attorney fees request and took testimony to the effect that defendants had requested fees representing half of the total amount of time spent on the motion to dismiss. Finding that this was reasonable under the circumstances because it took into account any duplication of work, the trial court awarded the amount requested. The trial court also found that the time expended was equivalent to the time expended in resisting the motion to dismiss by plaintiffs' attorneys, who also were familiar with the facts and issues from their participation in the other cases.

These findings are supported by the record, and we decline to disturb them on appeal. *See Williams v. Farmers Insurance Group, Inc.*, 781 P.2d 156 (Colo. App.1989), *aff'd*, 805 P.2d 419 (Colo.1991).

The judgment is affirmed.

MARQUEZ and BRIGGS, JJ., concur.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 92-1298

FREDERIC J. RAYMOND, J.A. MORRISON, ROBERT G. JACOBSEN, DONALD F. HILL, GEORGE H. LIVERIS, ROBERT A. IRWIN, A.D. BOND, VIRGINIA HOWARD, IRA S. REAVIS, and BILLY RHEA SARGENT, for themselves and on behalf of others similarly situated, and others as opt in or consent plaintiffs pursuant to applicable federal law,

Plaintiffs-Appellees,

v.

MOBIL OIL CORPORATION,

Defendant-Appellant.

Jan. 20, 1993

Before LOGAN, ANDERSON, and BALDOCK, Circuit Judge.

STEPHEN H. ANDERSON, Circuit Judge.

In this class action involving the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, defendant/appellant Mobil Oil Corporation appeals under 28 U.S.C. § 1292(b) from an interlocutory order of the district court denying Mobil's motion for summary judgment on certain claims of plaintiffs, former employees of Mobil.[1] Plaintiffs' action arose out of the same pension

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[1] 28 U.S.C. § 1292(b) permits interlocutory appeals from orders involving "a controlling question of law as to which there is substantial ground for difference of opinion. . . ." By order dated September 30, 1992, a panel of this court granted Mobil's petition to bring this interlocutory appeal, and ordered the appeal expedited.

plan amendment involved in a previous decision of this court, *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 498 U.S. 898, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990), as well as a recent decision of the Fifth Circuit, *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 68, 121 L.Ed.2d 35 (1992). Because we conclude that plaintiffs are not "participants" in an ERISA plan, and therefore lack standing to sue under ERISA, we reverse the district court's denial of Mobil's motion for summary judgment and remand for entry of summary judgment in favor of Mobil.

BACKGROUND

The essential undisputed facts relevant to this appeal are set forth in the *Mitchell* and *Christopher* opinions. We quote at some length from each:

> Until 1977, Mobil provided retirement benefits only in the form of an annuity. In 1977, Mobil added a "lump-sum option" to its retirement plan, the terms of which, for the purposes of this case, appear in the Retirement Plan of Mobil Oil Corporation as of January 1, 1984 (the Plan). Under the Plan, an employee could elect to receive a lump-sum payment which had the same equivalent actuarial value, discounted at 5%, as the annuity. In the case of early retirement, the Plan reduced the lump-sum payment by 5% for each year of retirement prior to the age of sixty. To qualify for the lump-sum option, an employee had to elect this option prior to retirement; had to be over fifty-five; and, at the date of his retirement, had to have a net worth of at least $250,000 or an accumulated lump sum in excess of $250,000.
>
> In February 1984, Mobil amended the lump-sum option. It raised the discount rate prospectively from 5% to 9.5% and increased the eligibility threshold from $250,000 to $450,000. It also linked the new

> threshold to the Consumer Price Index (CPI), projecting a rise in the threshold to correlate with a rise in the CPI. These changes, however, would not take effect until at least six months after Mobil announced them, pending approval by the IRS. The delayed effective date gave employees who were eligible for the lump-sum payment under the old criteria, but who might not meet the new threshold, the opportunity to decide whether to retire and take the lump sum or to continue working and accumulating more pension benefits with the possibility that they might not accumulate sufficient additional benefits to meet the new threshold requirement at the date of their retirement.

Mitchell, 896 F.2d at 466.

On July 16, 1984, Mobil sought a determination from the IRS that the plan as amended continued to meet the Internal Revenue Code's requirements for favorable tax treatment, including the requirement that pension plans not "discriminate in favor of highly compensated employees." 26 U.S.C. § 401 (a)(4). In meetings in late September 1984, the IRS reviewing agent expressed concern that the amended plan could result in benefits favoring highly compensated employees, and indicated that he might need to seek technical advice from Washington. In response, Mobil adopted another plan amendment allowing Mobil, in its sole discretion, to waive the eligibility threshold in individual cases for valid cause shown. After insertion of this provision, the IRS issued to Mobil a favorable determination letter on November 23, 1984, noting that continued qualification of the plan would depend upon its effect in operation.

Mobil announced the IRS approval to its employees on December 21, 1984, but did not notify its

> employees of the waiver provision until well after expiration of the six-month window—October 1985.

Christopher, 950 F.2d at 1213.[2]

Porter Mitchell, the plaintiff in *Mitchell*, was a fifty-six year old Mobil employee who retired during the six-month window period, and took his retirement benefits under the lump-sum $250,000 option, for which he qualified.[3] He brought suit, claiming that, by amending its retirement plan, Mobil had willfully violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, by constructively discharging him because of his age, had "breached its fiduciary duties under ERISA and had violated ERISA's anti-cutback provision, 29 U.S.C. § 1054(g), by retroactively limiting his right to the lump-sum benefit, an accrued benefit." *Mitchell*, 896 F.2d at 466. He also claimed that Mobil violated § 510 of ERISA, 29 U.S.C. § 1140, which prohibits discrimination against or discharge of a participant in an ERISA-covered benefit plan "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."

After receiving a favorable jury verdict awarding him substantial damages, this court reversed the award on appeal. We held that Mitchell had established that he had been constructively discharged because of his age, but that he had failed to prove that Mobil's proffered justifi-

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[2] The existence of the waiver provision was not discovered by Mitchell in his case until trial was underway. Our decision in *Mitchell* makes no mention of the waiver provision. The plaintiffs in *Christopher* argued that the concealment of the waiver option was fraudulent, and the plaintiffs in this case have, following *Christopher*, made the same fraud argument concerning the waiver option.

[3] As we noted in our decision, the availability of the lump-sum option "was important to Mr. Mitchell because at the time he was making [his choice], the market interest rate was over 9%. As a result, his lump sum, discounted at 5%, was worth approximately 140% more than his annuity." *Mitchell*, 896 F.2d at 466.

cation for its plan amendment was a mere pretext for discrimination.[4] Accordingly, his ADEA claim failed.

We held that Mitchell lacked standing under ERISA to challenge the plan amendment, and therefore reversed the award. We observed that the definition of "participant" under ERISA "excludes . . . former employees who have received a lump-sum payment of all their vested benefits because 'these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments.' " *Mitchell*, 896 F.2d at 474 (quoting *Joseph v. New Orleans Elec. Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985)). And we held Mitchell lacked standing as a former employee with a "reasonable expectation of returning to covered employment," *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 117, 109 S.Ct. 948, 958, 103 L.Ed.2d 80 (1989), because he had never sought reinstatement.

The *Christopher* plaintiffs also elected to retire during the six-month window period, opting for the lump-sum benefit under the old $250,000 criteria. They similarly filed suit, claiming that Mobil's conduct surrounding the plan amendment constituted age discrimination in violation of the ADEA, as well as "common-law fraud, civil

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[4] We observed that "[t]he relevant question [in a constructive discharge case] is whether Mobil's amendment of the Plan forced Mr. Mitchell, and similarly situated employees, to choose between two options both of which would leave him worse off than the status quo." *Mitchell*, 896 F.2d at 467. We held that it did, because Mitchell was forced to choose between (1) retiring during the six-month window period, as he in fact did, and receiving the lump-sum option under the old ($250,000) eligibility requirement, and (2) continuing to work, but having to requalify for the lump-sum option under the new ($450,000/linked to the CPI) criteria, and being uncertain if he ever would in fact so qualify. Either option was less desirable than the status quo—continuing to work, knowing that he was qualified for a lump-sum retirement when he decided to retire.

conspiracy, unlawful interference with contract rights, breach of the employment contract, negligence, and gross negligence." *Christopher*, 950 F.2d at 1213. The plaintiffs' complaint also alleged "in brief and conclusory fashion" that Mobil's conduct violated ERISA. *Id.*[5]

The district court granted Mobil's motion for summary judgment on the ADEA claims, holding that they were time-barred and granted Mobil's motion for judgment on the pleadings on the state law claims, holding that they were preempted by ERISA. It granted Mobil's Fed.R. Civ.P. 12(b)(1) and (6) motion to dismiss the contingent ERISA claim on the ground that plaintiffs were not "participants" under ERISA. On appeal, the Fifth Circuit affirmed the grant of summary judgment on the ADEA claims because they were time-barred, affirmed the dismissal of the state law claims as preempted by ERISA, but reversed the dismissal of plaintiffs' ERISA claims and remanded the matter to permit plaintiffs to plead their ERISA claims with greater specificity. The court specifically noted that it had "not determined that appellants [plaintiffs] will be able to establish a violation of section 510, only that they should be allowed to attempt to do so." *Christopher*, 950 F.2d at 1223.

Plaintiffs in this case are a class of former employees who retired on or before January 1, 1985, who were not told of the waiver option, and who assert that they would not have lost their jobs had they known of their right to apply for a waiver. They also allege that they were unaware of the fact that the $250,000 threshold could be "grandfathered" for each of them, by virtue of the enactment of the Retirement Equity Act ("REA"), effective July 31, 1984.[6] Specifically, they argue that:

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[5] The brevity of plaintiffs' ERISA allegations was apparently the result of their desire to preserve the ERISA claims in the event their state law claims were held preempted by ERISA.

[6] Section 301 of the REA prohibits the retroactive elimination of "an optional form of benefit" by means of a plan amendment.

> Mobil interfered with their right to the lump sum benefit under the $250,000 test by fraudulently leading plaintiffs to believe that that right was conditioned on an additional requirement, namely that plaintiffs retire early, when in fact that additional condition did not really exist. Plaintiffs were also discharged for the exercise of their right to the lump sum benefit under the $250,000 test and the right to be free from the cutback of that benefit. And Mobil fraudulently caused plaintiffs' discharges so that they could not attain the right under the Plan to apply for a waiver of the $450,000 requirement, and thereby keep both their jobs and the lump sum benefit.

Brief of Appellees at 24-25.

They filed suit, alleging that Mobil's conduct constituted a willful violation of the ADEA, as well as a violation of section 510 of ERISA.[7] Plaintiffs amended their

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29 U.S.C. § 1054(g). However, the REA specifically states that section 301's prohibition applies only to plan amendments made after July 30, 1984. 29 U.S.C. § 1001, Historical Note (Pub.L. 98-397, Title III, §§ 302, 303, Aug. 23, 1984, 98 Stat. 1451 § 302(d)(1)). Mobil formally adopted the plan amendment on June 13, 1984, prior to the effective date of the REA. However, because it did not receive IRS approval at that time for the entire amendment, it did not in fact adopt the plan with the waiver provision until September, 1984. Thus, plaintiffs argue that the entire plan amendment *was* subject to the REA, so that the right to retire under the $250,000 lump sum was "grandfathered". While they do not suggest that Mobil can be charged with concealing the existence and effect of the REA, they do claim that Mobil concealed the facts (i.e. the true date of the plan amendment) bearing upon their rights under the REA.

[7] ERISA § 510, 29 U.S.C. § 1140, provides in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of

complaint twice, ultimately deleting all of their ERISA claims except those based on a fraudulent discharge in violation of section 510. As a result of the alleged ERISA violations, plaintiffs seek

> all equitable and other relief as may be necessary to redress plaintiffs' rights asserted under those claims and to redress the violations of law alleged in those claims, including an order compelling reinstatement or equitable reinstatement of each plaintiffs' employment at a status and salary commensurate with his tenure as though his employment with Mobil were uninterrupted and with all previously elected retirement benefits, as well as accounts benefits, both past and future, as well as all other compensatory, consequential, and incidental measures of restitution, together with interest, attorneys' fees, costs, expert witness fees, punitive and exemplary damages.

Third Amended Complaint at 22, Appellant's Appendix Vol. I at A000022.

DISCUSSION

Under ERISA § 502, 29 U.S.C. § 1132, "participants" have standing to bring civil actions to enforce their rights under the terms of an ERISA-covered benefit plan or to enforce ERISA's provisions.[8] The term "partici-

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interfering with the attainment of any right to which such participant may become entitled under the plan. . . .

[8] Section 502 provides in pertinent part:

(a) Persons empowered to bring a civil action
A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

ERISA § 502, 29 U.S.C. § 1132.

pant" is statutorily defined as "any employee or former employee of an employer, . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan. . . ." ERISA § 3(7), 29 U.S.C. § 1002(7). In *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 117, 109 S.Ct. 948, 958, 103 L.Ed.2d 80 (1989) the Supreme Court further defined the term "participant," holding that it "is naturally read to mean either 'employees in, or reasonably expected to be in, currently covered employment,' or former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." (quoting *Saladino v. I.L.G.W.U. Nat'l Retirement Fund,* 754 F.2d 473, 476 (2d Cir.1985), and *Kuntz v. Reese,* 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied,* 479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986)). The Court has defined the statutory term "may become eligible" as requiring proof that the claimant has "a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Firestone,* 489 U.S. at 117-18, 109 S.Ct. at 958; *see also Uselton v. Commercial Lovelace Motor Freight, Inc.,* 940 F.2d 564, 581 n. 16 (10th Cir.), *cert. denied,* —— U.S. ——, 112 S.Ct. 589, 116 L.Ed.2d 614 (1991). Thus, to have standing to bring an ERISA action, plaintiffs must either be employees in or reasonably expected to be in currently covered employment, or former employees with a reasonable expectation of returning to covered employment or a colorable claim to vested benefits. Employees or former employees seeking to show they "may become eligible" for a benefit must prove that they have a colorable claim that they will prevail in a suit for benefits, or that eligibility requirements will be fulfilled in the future.

Plaintiffs argue that this case is like *Christopher* and, more importantly, is distinguishable from *Mitchell.* They therefore claim they should be afforded standing as participants, as the *Christopher* plaintiffs provisionally were,

and not be bound by our finding of no standing in *Mitchell.*

The crucial difference they assert exists between this case and *Mitchell* is that the entire case in *Mitchell* proceeded on the theory that Porter Mitchell was presented with a choice between retiring under the $250,000 lump sum option and continuing to work with the uncertainty of ever qualifying for the $450,000 lump sum. Thus, they characterize our *Mitchell* opinion as holding that "an employee faced with a difficult choice between preserving a valuable retirement benefit but giving up his job versus foregoing the benefit and keeping his job generally cannot choose the former, leave his job with all earned wages and benefits paid, and then later sue under ERISA for wages and benefits not earned." Brief of Appellees at 2. They assert that the choice Mr. Mitchell made was a "conscious one" even if "coercive" and amounting to a "constructive discharge." Because Mr. Mitchell's choice was conscious, plaintiffs argue, he could only establish ERISA standing by meeting one of the tests for "former employees" under *Firestone*—either a colorable claim to vested benefits or a reasonable expectation of returning to covered employment.

By contrast, they assert that plaintiffs' choices here were *not* conscious, because they were fraudulently procured and were therefore "no different from outright firings under ERISA § 510." *Id.* at 3. Relying on *Christopher,* they argue that Mobil's deceptive and fraudulent conduct, in violation of ERISA, vitiated the voluntariness of their decisions to retire. They therefore assert that, unlike Porter Mitchell, they need not establish standing as "former employees." While plaintiffs are obviously *in fact* former employees, they argue they are to be viewed legally as current employees, with clear participant status because they were current employees at the time of the ERISA violation which effectively involun-

tarily discharged them.[9] Even if they have to establish standing as former employees, plaintiffs argue they have demonstrated the existence of a genuine factual issue as to whether they have a reasonable expectation of returning to covered employment, such that Mobil's motion for summary judgment was properly denied.

Mobil responds that this case "is *Mitchell* redux." Brief of Appellant Mobil Oil Corporation at 17. It contends both that Mr. Mitchell clearly argued and the *Mitchell* opinion clearly held that an employee who retires, even if fraudulently induced to do so, and takes all the vested benefits to which he is entitled and does not ask his employer for reinstatement and has no reasonable expectation, based on custom or practice, that he will be reinstated, lacks standing to bring an ERISA action. He is clearly a former employee, who has no colorable claim to vested benefits (he has received them all already and cannot show that he will fulfill eligibility requirements in the future) and has no reasonable expectation of returning to covered employment (he has not sought reinstatement from his employer, and has no factual basis for believing that he will be reinstated).[10] He is merely seeking damages, not ERISA-protected benefits.

Thus, Mobil asserts that *Mitchell* correctly established a bright-line test that ERISA protects only benefits, and an employee who leaves his employment, under *any* circumstance, and receives all his benefits, cannot sue under

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[9] They alternatively argue that their standing as participants must be determined as of the time of the ERISA violation, and not at the time of their lawsuit. Under that theory too they would have participant status because they were clearly participants at the time of the alleged ERISA violation, and they would not have to meet the former employee tests for standing.

[10] Mobil argues that plaintiffs have failed to show *either* that they have a reasonable expectation of returning to covered employment or a colorable claim to vested benefits by showing that eligibility requirements will be fulfilled in the future.

ERISA. Moreover, *Mitchell* established that a request for judicial reinstatement is *per se* insufficient to establish a reasonable expectation of returning to covered employment. "Thus, ERISA does not provide a cause of action for former employees who have fulfilled all their eligibility requirements, received the full amount of their vested benefits, and seek only (a) reinstatement to accrue further benefits or (b) damages based on years they never worked." Brief of Appellant Mobil Oil Corporation at 28-29.

We review the denial of a motion for summary judgment de novo, applying the same standard as did the district court. *Miller v. Coastal Corp.*, 978 F.2d 622 (10th Cir.1992). Summary judgment will only be granted if "viewing the facts in the light most favorable to the opposing party, there is no genuine issue of material fact in dispute and the moving party should prevail as a matter of law." *Millensifer v. Retirement Plan for Salaried Employees of Cotter Corp.*, 968 F.2d 1005, 1007 (10th Cir.1992) (quoting *Woolsey v. Marion Lab., Inc.*, 934 F.2d 1452, 1456 (10th Cir.1991)); *Boren v. Southwestern Bell Tel. Co., Inc.*, 933 F.2d 891, 892 (10th Cir. 1991).

We begin by rejecting plaintiffs' rather novel argument that they really are, legally, current employees. As indicated, ERISA provides a remedy for "participants." "Participants" include " 'employees in, or reasonably expected to be in, currently covered employment.' " *Firestone*, 489 U.S. at 117, 109 S.Ct. at 957-58 (quoting *Saladino*, 754 F.2d at 476), or certain "former employees." Attributing " 'conventional meanings to the statutory language,' " *id.*, as we must, it defies common sense to conclude that employees who retired some seven years ago are anything other than "former employees." Thus, plaintiffs are, in fact and in law, "former employees." *See Katzoff v. Eastern Wire Prod. Co.*, 808 F.Supp. 96, 98 (D.R.I., 1992) (rejecting argument that plaintiff was a current employee

and therefore an ERISA participant even though he was "not currently working."); *Andre v. Salem Technical Serv.*, 797 F.Supp. 1416, 1421 (N.D.Ill. 1992) ("Because [plaintiff] no longer works for [employer], he does not fall within the statutory provision for suits by current 'employees.' ").

In reaching this conclusion, we similarly reject plaintiffs' related argument that their standing as participants should be judged as of the time of the ERISA violation and not as of the time of their lawsuit. Such an interpretation runs counter to the natural meaning of ERISA itself. Section 502 provides that "[a] civil action *may be brought . . . by a participant* . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." ERISA § 502, 29 U.S.C. § 1132 (emphasis added). The statute by its terms does *not* permit a civil action by someone who *was* a participant at the time of the alleged ERISA violation. *Cf. Teagardener v. Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 951 n. 2 (6th Cir.1990) ("The Plan provides benefits for a 'Former Participant," a term that is not defined or mentioned in ERISA."), *cert. denied*, 498 U.S. 1027, 111 S.Ct. 678, 112 L.Ed.2d 670 (1991). Rather, it is written in the present tense, indicating that current participant status is the relevant test. *See Winchester v. Pension Comm. of Michael Reese Health Plan, Inc.*, 942 F.2d 1190, 1194 (7th Cir.1991) ("[Plaintiff] was not a plan participant at the time the action was filed and thus has no standing."); *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708 (5th Cir. 1985) ("[Q]uestions of standing must be resolved on the facts existing when the challenge is raised."); *McKinnon v. Cairns*, 698 F.Supp. 852, 858 (W.D.Okla. 1988). Furthermore, there would be little need for the widely-invoked category of "former employees" if partici-

pant status was based upon status at the time of the alleged ERISA violation.[11]

Having concluded that plaintiffs must meet the requirements for former employees in order to satisfy ERISA's "participant" requirement, we conclude that, despite plaintiffs' artful attempts to fit within *Christopher, Mitchell* compels the conclusion that plaintiffs lack standing.

As indicated, only former employees who are or "may become eligible to receive a benefit of any type from an employee benefit plan" satisfy the participant requirement of ERISA. That definition includes "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Firestone,* 489 U.S. at 117, 109 S.Ct. at 958 (quoting *Kuntz v. Reese,* 785 F.2d 1410, 1411 (9th Cir.) per curiam), *cert. denied,* 479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986)). A former employee may further prove that he or she "may become eligible" to receive a benefit by showing he or she has "a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.*

We held in *Mitchell* that that definition simply "excludes . . . former employees who have received a lump-

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[11] We disagree with plaintiffs' assertion that *Drennan v. General Motors Corp.,* 977 F.2d 246 (6th Cir.1992), "held that an employee who has lost his status as a current employee and thus as an ERISA 'participant' as a result of his employer's deceit has standing to sue under ERISA because he had such standing at the time of the ERISA violation." Brief of Appellees at 5. In *Drennan,* the Sixth Circuit held that employees who were eligible for a certain benefit payout were participants for ERISA purposes, even though they had already received their benefits under another, less favorable, benefits plan. By contrast, plaintiffs here in fact received all benefits for which they were eligible. They cannot claim participant status based on eligibility for benefits not received.

sum payment of all their vested benefits because 'these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments.' " *Mitchell,* 896 F.2d at 474 (quoting *Joseph,* 754 F.2d at 630); *see also Sanson v. General Motors Corp.,* 966 F.2d 618, 621 (11th Cir.1992) (retiree claiming he was fraudulently induced to retire early is not an ERISA participant); *Boren,* 933 F.2d at 893-94; *Teagardener,* 909 F.2d at 952 ("Explicit in the Supreme Court's definition of 'participant' in *Bruch* is a requirement that the plaintiffs prove either that their right to assets has 'vested' or will 'vest.' "); *Nishimoto v. Federman-Bachrach & Assocs.,* 903 F.2d 709, 714 (9th Cir. 1990) ("former employees whose vested benefits under a plan have already been distributed in a lump sum at the time they file suit are not 'participants' within the meaning of section 1002(7)"). They therefore seek "a damage award, not vested benefits improperly withheld." *Mitchell,* 896 F.2d at 474; *Boren,* 933 F.2d at 893-94; *Saporito v. Combustion Eng'g, Inc.,* 843 F.2d 666, 671 (3rd Cir.1988) ("As a general rule, employees who take early retirement and elect to receive lump sum retirement benefits do not have standing to seek the increased payment later made to retirees or to challenge changes in the retirement plan."), *vacated,* 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989); *Kuntz,* 785 F.2d at 1411 ("plaintiffs are not participants because, as former employees whose vested benefits under the plan have already been distributed in a lump sum, [they] were not 'eligible to receive a benefit' and were not likely to become eligible to receive a benefit, at the time they filed the suit."); *Yancy v. American Petrofina, Inc.,* 768 F.2d 707 (5th Cir.1985) (per curiam); *cf. Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan,* 883 F.2d 345, 350 (5th Cir.1989) (plaintiffs are ERISA participants because they claimed "that the amount received was not the full amount of vested benefits due under the terms of the profit sharing plan. . . ."). The

crucial point is the receipt of the "full extent" of their vested benefits. That is equally true of plaintiffs in this case. They too seek a damage award based upon their allegedly fraudulent discharge from their jobs; they do not seek "vested benefits improperly withheld."

Plaintiffs invoke the *Christopher* court's analysis in an attempt to avoid the breadth of that holding in *Mitchell*. Thus, they argue that the fact that Mobil fraudulently induced them to retire by hiding from them the existence of the waiver provision and certain facts which they needed to be able to properly evaluate the impact of the REA on their pension rights, somehow renders our *Mitchell* holding inapplicable to them. We disagree. The existence of fraud is irrelevant to the linchpin of our *Mitchell* holding—the receipt of all benefits to which the employee is entitled under the plan.

Furthermore, the *Christopher* court itself acknowledged, in its discussion of plaintiffs' ADEA claims, that the alleged fraud made no legal or conceptual difference concerning the voluntariness of plaintiffs' decision:

> [A]ppellants allege a constructive discharge arising from the choice to which they were put by the plan amendment. To further argue that the actual election made was involuntary because it was based on incomplete information would be superfluous; involuntariness is implicit in appellants' argument that they were coerced into early retirement by the threatened removal of the lump sum option.

Christopher, 950 F.2d at 1215. Similarly, plaintiffs here cannot say that the constructive discharge in *Mitchell* was actually a conscious choice whereas the equally compelled discharge here was completely involuntary simply because plaintiffs here acted on incomplete information.

Moreover, the *Christopher* court's "but for" standing analysis—"but for the employer's conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving bene-

fits", *Christopher*, 950 F.2d at 1221—amounts to the kind of analysis rejected by the Supreme Court in *Firestone:* "[t]o say that a 'participant' is any person who claims to be one begs the question of who is a 'participant' and renders the definition set forth in § 1002(7) superfluous." 489 U.S. at 117, 109 S.Ct. at 957. To say that but for Mobil's conduct, plaintiffs would have standing is to admit that they lack standing and to allow those who merely *claim* to be participants to be deemed as such. *See Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986) ("The effect of reading a 'but for' test is to impose participant status on every single employee who *but for* some future contingency may become eligible. Neither caselaw nor other provisions of ERISA supports such a reading of 'participant.' "). Plaintiffs therefore cannot, under *Firestone, Mitchell*, and *Boren*, show that they are former employees with a colorable claim to vested benefits.[12]

Plaintiffs also assert that they satisfy the "participant" requirement as former employees with "a reasonable expectation of returning to covered employment." More specifically, they argue that there is a genuine factual dispute as to that issue, such that summary judgment for Mobil on their ERISA claims would be improper.

In *Mitchell*, we agreed with Mobil that Mr. Mitchell "has never had a reasonable expectation of returning to covered employment." In so doing, we observed that Mr. Mitchell "did not claim that Mobil had improperly withheld vested benefits. He also did not make such a claim

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[12] We also note, as have several other courts, that Department of Labor regulations interpreting ERISA specifically exclude from the definition of participant "an individual to whom an insurer has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan." 29 C.F.R. § 2610.2. *See, e.g., Teagardener*, 909 F.2d at 952; *Kuntz*, 785 F.2d at 1412; *Joseph*, 754 F.2d at 630; *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473, 476-77 (2d Cir.1985); *see also* 29 C.F.R. § 2510.3-3(d)(2)(ii)(B).

in his complaint, *nor did he seek reinstatement.*" *Mitchell,* 896 F.2d at 474 (emphasis added).

Mobil argues we established a clear rule that a request for judicial reinstatement is *per se* insufficient to establish a "reasonable expectation of returning to covered employment," because Mitchell made it clear to this court in his briefs and his petition for rehearing that he had sought judicial reinstatement. Thus, Mobil argues that our rejection of his argument must be viewed in that context and must be read as implying that a request for judicial reinstatement *alone* is insufficient.

We are reluctant to read anything more into a judicial opinion, even one of our own, than what the plain words of the opinion state. Viewing the actual language of our *Mitchell* opinion alone, without any background information to which we may be privy but which others lack, we must conclude that the opinion does not establish any *per se* rule concerning the effect of a request for judicial reinstatement. The opinion simply observes that Mr. Mitchell did not "seek reinstatement," and that was one reason why he did not have a reasonable expectation of returning to covered employment. *Mitchell* is unclear as to what *kind* of request for reinstatement was insufficient to establish a reasonable expectation of returning to covered employment.

We agree with Mobil, however, that plaintiffs here cannot satisfy ERISA's participant requirement by claiming to be former employees with a reasonable expectation of returning to covered employment. Few cases have examined carefully what constitutes such a reasonable expectation. We agree with the analysis in *Shawley v. Bethlehem Steel Corp.,* 784 F.Supp. 1200, 1205 (W.D.Pa. 1992):

> Plaintiffs had no statutory right to be rehired, nor any contractual right to be rehired. . . . It would be paradoxical to hold that the pension plan provisions gave them more. For a reasonable expectation of

> returning to employment to exist, there must be a claim of right on the part of the former employee to return to work.

See also Winchester v. Pension Comm. of Michael Reese Health Plan, Inc., 942 F.2d 1190, 1193 (7th Cir. 1991) (refusing to hold that "by filing a discrimination suit, [after being dismissed for cause], plaintiff may harbor a 'reasonable expectation of returning to covered employment.' "); *Zydel v. Dresser Indus., Inc.*, 764 F.Supp. 277, 280-81 (W.D.N.Y. 1991) (reasonable expectation of returning to covered employment evaluated with reference to four specific pieces of evidence); *Rhee v. Witco Corp.*, 762 F.Supp. 211, 213 (N.D.Ill. 1991) (ERISA plaintiff had no reasonable expectation of returning to covered employment because he "does not seek to return to work . . .; he wants only to obtain the benefits he would have accrued had he continued to work."); *Deller v. Portland Gen. Elec. Co.*, 727 F.Supp. 1369, 1370 (D.Ore. 1989) (former employees terminated pursuant to a reduction in force "are clearly not employees . . . who have a reasonable expectation of returning to covered employment."). We hold as a matter of law that a reasonable expectation of returning to covered employment cannot encompass the undisputed situation here, where plaintiffs retired, received all their vested benefits, did not ask their employer for reinstatement and can point to nothing suggesting that Mobil will, should or must reinstate them, but instead filed suit seeking reinstatement to commence accruing benefits anew.

Finally, plaintiffs suggest that a definition of "participant" which excludes them will leave them without a remedy, inasmuch as their state law claims were held preempted by ERISA.[13] Preemption is not at issue in this case, and we do not address it. However, we note that the fact that a state law claim may be preempted does

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[13] Counsel for plaintiffs stated at oral argument that they have appealed the state court decision finding preemption.

not necessarily mandate that there be an ERISA remedy. *See Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir.) ("While we are not unmindful of the fact that our interpretation of the preemption clause leaves a gap in remedies within a statute intended to protect participants in employee benefits plans, the lack of an ERISA remedy does not affect a pre-emption analysis."), *cert. denied*, —— U.S. ——, 113 S.Ct. 812, 121 L.Ed.2d 684 (1992); *Cromwell v. Equicor HCE Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991) ("Nor is it relevant to an analysis of the scope of federal preemption that appellants may be left without a remedy."), *cert. denied*, —— U.S. ——, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992); *Hospice of Metro Denver, Inc. v. Group Health Ins.*, 944 F.2d 752, 755 (10th Cir. 1991) ("We are aware that preemption normally is not dependent upon the availability of ERISA remedies.") (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 1556, 95 L.Ed.2d 39 (1987); *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989)).[14]

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[14] Furthermore, ERISA preemption extends to "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a). The Supreme Court has "repeatedly stated that a law 'relates to' a covered employee benefit plan for purposes of § 514(a) 'if it has a connection with or reference to such a plan.'" *District of Columbia v. Greater Washington Bd. of Trade*, —— U.S. ——, ——, 113 S.Ct. 580, 583, 121 L.Ed.2d 513 (Dec. 14, 1992) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983)); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 482-83, 112 L.Ed.2d 474 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52, 58-59, 111 S.Ct. 403, 407-08, 112 L.Ed.2d 356 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987); *Monarch Cement Co. v. Lone Star Indus., Inc.*, 982 F.2d 1448, 1451-52, (10th Cir.1992).

While ERISA's preemption clause is "conspicuous for its breadth," *Ingersoll-Rand*, 498 U.S. at 138, 111 S.Ct. at 482 (quoting *FMC*

Furthermore, while pension and other benefits are undeniably an important part of an employee's compensation package, they are nonetheless an adjunct to the primary item which the employee has—his or her job. And,

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Corp. v. Holliday, 498 U.S. at 58, 111 S.Ct. at 407), we recently observed in *Monarch Cement Co.*, that the:

> purpose of ERISA preemption is twofold. First, preemption "protect[s] the interests of employees and their beneficiaries in employee benefit plans." Second, preemption "ensure[s] that plans and plan sponsors are subject to a uniform body of benefit law . . . [by] minimizing the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government."

982 F.2d at 1453-54 (quoting *Straub v. Western Union Tel. Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988) (quoting *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir.1986)) *and Ingersoll-Rand*, 111 S.Ct. at 484). " 'What triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative function of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit.' " *Monarch Cement Co.*, 982 F.2d at 1452 (quoting *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 146-47 (2d Cir.), *cert. denied*, 493 U.S. 811, 110 S.Ct. 57, 107 L.Ed.2d 25 (1989)); *see also National Elevator Indus., Inc. v. Calhoon*, 957 F.2d 1555, 1558-59 (10th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 406, 121 L.Ed.2d 331 (1992).

ERISA's preemptive reach, although broad, is not unlimited. *Monarch Cement Co.*, 982 F.2d at 1452; *Hospice of Metro Denver v. Group Health Ins.*, 944 F.2d 752, 755 (10th Cir.1991). In *Monarch Cement Co.*, we tried to define the parameters of ERISA preemption, noting that the case law in the area is far from uniform:

> Laws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee. Those that have not been preempted are laws of general application—often traditional exercises of state power or regulatory authority—whose effect on ERISA plans is incidental.

Id. at 1452, (quoting *Aetna Life Ins. Co.*, 869 F.2d at 146); *see also National Elevator Indus., Inc.*, 957 F.2d at 1558-59; *Hospice of Metro Denver*, 944 F.2d at 755. Thus, ERISA does *not* preempt "if the state law has only a 'tenuous, remote, or peripheral' con-

ERISA's goal of protecting those benefits from interference does not transform ERISA's statutory scheme into a federal job protection scheme where those benefits are fully paid out, or create a federal cause of action for wrongful discharge.[15] To do so would, as Mobil argues, transform traditional employment law in the fifty states.[16] We cannot believe Congress intended such a result when

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nection with covered plans, as is the case with many laws of general applicability." *Greater Washington Bd. of Trade,* —— U.S. at —— n. 1, 113 S.Ct. at 583 n. 1 (quoting *Shaw,* 463 U.S. at 100 n. 21, 103 S.Ct. at 2901 n. 21)). An argument could certainly be made that the fraud claims plaintiffs have made in this case are such "laws of general applicability."

Thus, this is not a case where the state law "specifically refers" to an ERISA plan, as in *Greater Washington Bd. of Trade,* —— U.S. at ——, 113 S.Ct. at 585, nor even where the preempted claim is "premised on" the existence of an ERISA plan, as in *Ingersoll-Rand,* 498 U.S. at 140, 111 S.Ct. at 483. The state law claim in *Ingersoll-Rand* was a common law claim for wrongful discharge based upon the employer's desire to prevent the employee from vesting in his benefit plan. There is no such claim here. Rather, plaintiffs here simply allege a wrongful discharge, achieved through fraud. The fact that an ERISA plan was merely part of the means by which Mobil allegedly fraudulently procured plaintiffs' dismissal does not necessarily compel the conclusion under *Ingersoll-Rand* that that state law claim is "premised on" the existence of an ERISA-covered plan. *Cf. Tolle v. Carroll Touch, Inc.,* 977 F.2d 1129 (7th Cir.1992) (state law wrongful discharge claim preempted because claim was that plaintiff was discharged in order to avoid payment of benefits under ERISA plan); *but see Sanson v. General Motors Corp.,* 966 F.2d 618, 621 (11th Cir.1992) (plaintiffs' state law fraud claim for fraudulently induced retirement is preempted).

[15] Indeed, Congress knows perfectly well how to create a federal cause of action for wrongful discharge when it wants to. *See, e.g.,* the ADEA, 29 U.S.C. §§ 621-634; Title VII, 42 U.S.C. § 2000e et seq.

[16] Under plaintiffs' theory, to the extent that the employer-employee relationship allows termination at-will under state law, employers would, in some instances, no longer be able to exercise that right whenever an ERISA-covered plan is part of an employee's compensation package.

it enacted ERISA. *Cf. Patterson v. Shumate*, —— U.S. ——, ——, 112 S.Ct. 2242, 2250, 119 L.Ed.2d 519 (1992) ("ERISA's goal . . . [is to] protect[] *pension benefits*.") (emphasis added); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148, 105 S.Ct. 3085, 3093, 87 L.Ed.2d 96 (1985) (purpose of ERISA is "to protect contractually defined benefits."); *Hospice of Metro Denver*, 944 F.2d at 755-56; *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3rd Cir.) ("Proof of incidental loss of benefits as a result of a termination will not constitute a violation of § 510."), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986) ("the legislative intent of ERISA was not to assure the sanctity of early retirement expectations, but to safeguard accrued retirement benefits.").[17]

For the foregoing reasons, we REVERSE the district court's denial of Mobil's motion for summary judgment on plaintiffs' ERISA claims and REMAND for entry of summary judgment in favor of Mobil.

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[17] The appellees' "Request For Leave to File Limited Sur-Reply in Opposition to Motion to Strike Appellees' Supplemental Appendix and Portions of Appellees' Brief" is granted. Appellant's "Motion to Strike Appellees' Supplemental Appendix and Portions of Brief Relying on Supplemental Appendix" is granted insofar as it relates to materials which were not before the district court in this case.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-4562

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,
Plaintiffs-Appellants,

v.

MOBIL OIL CORPORATION, RETIREMENT PLAN OF MOBIL OIL CORPORATION and REX ADAMS,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

Jan. 24, 1992

Rehearing Denied Feb. 24, 1992

Before HENLEY *, KING, and GARWOOD, Circuit Judges.

GARWOOD, Circuit Judge:

Appellants brought claims under the Age Discrimination in Employment Act (ADEA) and the Employee Re-

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* Circuit Judge of the Eighth Circuit, sitting by designation.

tirement Income Security Act (ERISA), as well as various common-law claims including fraud, civil conspiracy, and breach of the employment contract, against their former employer Mobil Oil Corporation, based on Mobil's 1984 amendment of its employee benefit plan and alleged failure to disclose to appellants all of the options available under the amended plan. The district court granted Mobil's motion for summary judgment on the ADEA claims on the grounds that the claims were time-barred and that as a matter of law appellants were not constructively discharged in violation of ADEA. The district court also granted Mobil's request for judgment on the pleadings on appellants' state law claims on the ground that they were preempted by ERISA, and dismissed the ERISA claims on the ground that because appellants were not participants seeking to recover benefits from a retirement plan, the court lacked jurisdiction over their ERISA claims. We affirm in part and reverse and remand in part.

Facts and Proceedings Below

The following facts are drawn from the parties' submissions of undisputed facts in connection with Mobil's motions for summary judgment, judgment on the pleadings, and dismissal.

Mobil provides retirement benefits for its employees through a defined benefit plan, under which employees receive a pension based on years of service, salary history, and life expectancy. Until 1977, the standard method of receiving these pensions was in the form of an annuity. In that year, however, Mobil added a lump sum option, enabling certain employees to receive the actuarial equivalent of their annuity, discounted at five percent, in one payment following retirement. To be eligible for the lump sum option, an employee had to have either an accrued lump sum pension benefit, or a net worth independent of the pension, equal to at least $250,000. Also,

the employee was required to be at least fifty-five years old.

On July 2, 1984, Mobil announced changes to the lump sum option of the retirement plan, including (1) an increase in the discount rate from 5% to 9.5%, to operate prospectively, *i.e.*, to be applied to all earnings after January 31, 1985; (2) an increase in the eligibility threshold from $250,000 to $450,000; and (3) a linking of the new threshold to the Consumer Price Index. These changes, which were announced as subject to Internal Revenue Service (IRS) approval, would apply to all employees retiring after January 31, 1985; thus, employees otherwise eligible to retire had a six-month window in which they could retire subject to the lower threshold and lower discount rate. The choice was a significant one for employees who met the $250,000 threshold but who were uncertain ever to meet the indexed $450,000 threshold because, with market interest rates well above 5%, the lump sum pensions were worth 40% more than the annuities. Appellants, Gerald Christopher, Charles Prunty, and Billy Turner, were among the approximately 1,100 Mobil employees who elected to take early retirement during the 6-month window. All three submitted their retirement notices between August and October 1984, and retired as of January 1, 1985.

On July 16, 1984, Mobil sought a determination from the IRS that the plan as amended continued to meet the Internal Revenue Code's requirements for favorable tax treatment, including the requirement that pension plans not "discriminate in favor of highly compensated employees." 26 U.S.C. § 401(a)(4). In meetings in late September 1984, the IRS reviewing agent expressed concern that the amended plan could result in benefits favoring highly compensated employees, and indicated that he might need to seek technical advice from Washington. In response, Mobil adopted another plan amendment allowing Mobil, in its sole discretion, to waive the eligibility

threshold in individual cases for valid cause shown. After insertion of this provision, the IRS issued to Mobil a favorable determination letter on November 23, 1984, noting that continued qualification of the plan would depend upon its effect in operation.

Mobil announced the IRS approval to its employees on December 21, 1984, but did not notify its employees of the waiver provision until well after expiration of the six-month window—October 1985. Because of a 1985 IRS revenue ruling and subsequent pronouncements, Mobil eventually entirely deleted the lump sum eligibility threshold in 1986.

Appellants filed age discrimination charges against Mobil with the Equal Employment Opportunity Commission (EEOC) on March 1, 1989. They alleged that Mobil's conduct in amending the plan and concealing the waiver provision was a concerted scheme to reduce its work force. By purporting to increase the lump sum threshold and concealing its awareness that applicable tax law precluded that action, appellants charged, Mobil induced hundreds of older employees into retirement without the need to pay them an early retirement bonus. The EEOC dismissed the charges as untimely filed. Appellants then commenced this suit on July 7, 1989. They alleged that Mobil's conduct constituted age discrimination in violation of ADEA, 29 U.S.C. §§ 621 *et seq.*, as well as common-law fraud, civil conspiracy, unlawful interference with contract rights, breach of the employment contract, negligence, and gross negligence. In the event that appellants' state law claims were held to be preempted by ERISA, the complaint alleged in brief and conclusory fashion that Mobil's conduct violated ERISA, apparently ERISA § 510, 29 U.S.C. § 1140, prohibiting interference with an employee's attainment of a right under ERISA. For all claims, appellants sought the wages and employment benefits they would have received had they continued working until normal retirement age. On the ADEA claims, appellants also requested reinstatement.

Mobil moved for summary judgment on the ADEA and state law claims. The district court granted the motion, finding that the ADEA and state law claims were time-barred, that appellants had not been constructively discharged in violation of the ADEA, and that appellants' claims of discrimination arose from changes in fringe benefits available under a bona fide retirement plan, not from discrimination in nonfringe aspects of employment, and thus were not within the purview of the ADEA according to ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2). Simultaneously, Mobil moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) on the state law claims on the ground that they were preempted by ERISA, and dismissal under Federal Rules of Civil Procedure 12(b)(1) & (6) of the contingent ERISA claim on the ground that appellants were not "participants" seeking to recover benefits under ERISA § 502, 29 U.S.C. § 1132, depriving the court of jurisdiction. The district court granted this motion as well.

Discussion

I. ADEA Claims

We first examine the district court's grant of summary judgment on the ADEA claims on the ground that they were time-barred. In reviewing a grant of summary judgment, all legitimate factual inferences presented by the record are drawn in favor of the party opposing the motion. *Bozé v. Branstetter*, 912 F.2d 801, 804 (5th Cir. 1990) (per curiam). We can uphold the summary judgment only if our review demonstrates that no genuine issue of material fact remains and that the moving party is entitled to judgment as a matter of law. *Id.*

It is not disputed that the applicable statutes of limitations require an employee to file an age discrimination charge with the EEOC within 300 days after the alleged unlawful practice occurred, 29 U.S.C. § 626(d)(2), and to file a lawsuit within 3 years after the alleged unlawful practice occurred, 29 U.S.C. §§ 255(a), 626(e). Appel-

lants argue, however, that a genuine issue of material fact exists as to when their awareness of the facts constituting the alleged age discrimination was sufficient to commence the running of the limitations period. *See Pruet Production Co. v. Ayles*, 784 F.2d 1275, 1279 (5th Cir. 1986) ("[T]he statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with reasonably prudent regard for his rights." (quoting *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 930 (5th Cir. 1975))). Specifically, they argue that Mobil's negotiation of a revised plan in October 1984 only came to light in 1988 when counsel for another former employee, Porter Mitchell (Mitchell), suing Mobil in federal district court in Colorado, discovered the correspondence between Mobil and the IRS. It was only when this fact became publicly known at the trial of *Mitchell v. Mobil Oil Corp.* in December 1988,[1] appellants argue, that they had any reason to know of Mobil's concealment of the waiver option. Appellants' EEOC filing in March 1989 and their commencement of this suit in July 1989 would both have been timely if the statute of limitations had commenced running in December 1988.

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[1] The alleged fraud was not part of Mitchell's claims against Mobil. He argued, rather, that the plan amendment itself constituted a constructive discharge and was a willful violation of the ADEA. He also argued that Mobil had breached its fiduciary duties under ERISA § 404, 29 U.S.C. § 1104, and had violated ERISA's anti-cutback provision, ERISA § 204(g), 29 U.S.C. § 1054(g), by retroactively limiting his right to the lump sum option, an accrued benefit. The jury found in favor of Mitchell on his ADEA claim and awarded him damages for back pay, front pay, and lost benefits. The district court held in favor of Mitchell on the ERISA claims as well, awarding him compensatory and liquidated damages. On appeal, the Tenth Circuit reversed, holding that Mitchell had failed to prove that Mobil's proffered justification for the plan amendment was a mere pretext for discrimination, and that Mitchell was not a participant with standing to assert ERISA claims. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 471-74 (10th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

Evaluating the appellants' claim that the statute of limitations did not commence until December 1988 requires an analysis of the nature of their ADEA claim. The ADEA forbids an employer to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). A "discharge" within the meaning of this section may be constructive if a reasonable person in the employee's position would have felt compelled to resign under the circumstances. *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 192 (5th Cir.), *cert. denied*, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 248 (1988). An attractive early retirement offer, however, is not a constructive discharge merely because it creates a strong incentive to retire; an early retirement option can constitute a constructive discharge only if the employee shows that it sufficiently alters the status quo that each choice facing the employee makes him worse off. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 467 (10th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990); *Bodnar*, 843 F.2d at 193.

The gist of appellants' *prima facie* ADEA claim is as follows. The adoption of the 1984 plan amendment presented appellants with a choice between unfavorable options; they faced the choice of retiring within the six-month window or staying on at Mobil but possibly forgoing eligibility for the lump sum payout. Either could be regarded as less favorable than staying on at Mobil until normal retirement age with the assurance of eligibility for the lump sum payout, which was the "status quo" when the amendment was adopted. The asserted discriminatory character of the amendment to the plan arises from the fact that only employees over the age of fifty-five were put to that choice. Employees under fifty-five did not presently qualify for retirement, so although the plan amendment may have defeated an expectation for them, they were not confronted with the possibility of losing a benefit for

which they were then qualified. *See Mitchell,* 896 F.2d at 496.

This much of the ADEA theory was evident in July 1984 upon the initial announcement of the plan. The unfavorable choice to which it put "window" employees and its particular impact on employees over fifty-five were both apparent on the face of the plan amendment. Indeed, the theory outlined above was precisely Mitchell's claim against Mobil, accepted by the Tenth Circuit. Mitchell filed a complaint with the EEOC on April 25, 1985, with no knowledge of Mobil's alleged concealment of the waiver provision. Moreover, another employee, Frederic J. Raymond (Raymond), filed a similar charge with the Ohio Civil Rights Commission and the EEOC on May 10, 1985. Therefore, unless appellants can show that Mobil's alleged concealment adds a material element to their ADEA claim, the statute of limitations should have commenced running in July 1984.

Appellants have offered no theory under which the alleged nondisclosure is a necessary element. They refer us to the Fourth Circuit case of *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167 (4th Cir. 1988), for their argument that "where, as here, the employee surrenders his job as a proximate result of fraud and deceit by the employer, the voluntariness of the retirement or resignation is fundamentally vitiated." *Stone* is one of a series of cases where resignations have been held to be involuntary based on an employer's misrepresentations about or nondisclosure of an employee's rights. Others include *Covington v. Department of Health and Human Services,* 750 F.2d 937 (Fed.Cir.1984), and *Scharf v. Department of the Air Force,* 710 F.2d 1572 (Fed.Cir.1983).

We do not believe that these cases avail appellants, however. As appellants' phrasing of their argument reflects, the effect of a showing of fraud in these cases is to render an otherwise voluntary choice involuntary. *Stone*

and related cases involve disputes in which public employees were entitled to certain procedural protections if they were to be terminated involuntarily; they were required to show that their retirement was involuntary to invoke the jurisdiction of the Merit Systems Protection Board or to establish a "deprivation" under the due process clause. Here, by contrast, appellants allege a constructive discharge arising from the choice to which they were put by the plan amendment. To further argue that the actual election made was involuntary because it was based on incomplete information would be superfluous; involuntariness is implicit in appellants' argument that they were coerced into early retirement by the threatened removal of the lump sum option. Assuming, *arguendo* only, that appellants' allegation of non-disclosure would serve to estop Mobil from raising in defense the claim that appellants' retirement was voluntary, nevertheless the asserted nondisclosure does not form a material part of appellants' constructive discharge theory that would prevent the statute of limitations from commencing.

Appellants' arguments that this Court should apply equitable tolling or equitable estoppel fail for similar reasons. These doctrines provide for tolling of the statute of limitations when a plaintiff's unawareness of his ability to bring a claim—either unawareness of the facts necessary to support a discrimination charge or unawareness of his legal rights—is due to defendant's misconduct. *See Rhodes v. Guiberson Oil Tools Division*, 927 F.2d 876, 878-79 (5th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 198, 116 L.Ed.2d 158 (1991); *Kale v. Combined Insurance Co.*, 861 F.2d 746, 752 (1st Cir.1988). Here, the knowledge allegedly concealed from the employees was that they had a third option—to continue their employment and apply for a waiver from the higher lump sum requirement. Therefore, the facts as known to the employees in 1984 actually gave them a *better* ADEA claim than they would have had with full knowledge. Whatever nondisclosures Mobil is guilty of would not have lulled appellants into

postponing assertion of their rights; if anything, it would have made them *more* likely to assert that they were constructively discharged.

Finally, appellants argue that although they knew in 1984 of the plan amendment and retirement window, they were misled into believing that they had no cause of action by Mobil's plausible justifications for its amendment of the plan, *i.e.*, that the threshold was changed to adjust for intervening inflation and that the discount rate was raised to align Mobil's practice with that of its competitors and to more realistically reflect current interest rates. In other words, appellants contend that although the discriminatory *effect* of the amendment was apparent in 1984, it was only upon learning of the concealment of the waiver option that they had reason to believe the plan amendment was actuated by age bias and that the alleged concerted scheme to reduce the work force began to take shape.

We find this argument unpersuasive as well. First, we fail to see how the deception alleged by appellants calls into question Mobil's proffered justifications for the plan amendment. The evidence does not create a genuine dispute as to the factual accuracy of Mobil's proffered justifications. Even if appellants' allegations are true respecting Mobil's having deceived its employees about the validity under applicable tax law of the plan amendment and about the waiver provision, there is no evidence showing that Mobil's announced reasons for the plan amendment were deceptive. This is an issue on which appellants would have had the burden at trial, and they were hence required to meet Mobil's summary judgment motion with summary judgment evidence that would sustain a jury finding in their favor on the issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Blumberg v. HCA Management Co., Inc.*, 848 F.2d 642, 644 (5th Cir.1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 781 (1989).

In any event, a showing of deception as to motive supports equitable estoppel only if it conceals the very fact

of discrimination; equitable estoppel is not warranted where an employee is aware of all of the facts constituting discriminatory treatment but lacks direct knowledge of the employer's subjective discriminatory purpose. Thus, where an employee was told that he was being discharged because industry economic downturn required reduction of the work force, and was told that he would be considered for re-hiring, we applied equitable estoppel to hold that limitations on his ADEA claim did not commence until he learned that he had been replaced by a younger employee. *Rhodes,* 927 F.2d at 880-82; *see also Coke v. General Adjustment Bureau, Inc.,* 640 F.2d 584, 595 (5th Cir.1981) (en banc) (employer's misrepresentation that employee would be reinstated induced foreseeable forbearance in filing ADEA claim); *Meyer v. Riegel Products Corp.,* 720 F.2d 303, 307 (3d Cir.1983) (employer's explanation to employee that he was dismissed as part of a reorganization furnished grounds for equitable tolling in an ADEA suit until discharged employee learned that a younger replacement had been hired), *cert. dismissed,* 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984). By contrast, where an employee knew that he was discharged and replaced by a younger employee, his allegation that the company concealed from him the true reason for his discharge and that it was not until subsequent hirings that the "pattern of age discrimination" became evidence was held insufficient to support equitable estoppel. *Pruet Production Co.,* 784 F.2d at 1279-80; *accord Chapman v. Homco, Inc.,* 886 F.2d 756, 758 (5th Cir.1989), *cert. denied,* 494 U.S. 1067, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990); *Blumberg,* 848 F.2d at 645.[2] The showing required for a *prima facie* employment discrimination claim is minimal, *see Pruet*

[2] This view is consistent with this Circuit's rule in Title VII cases that the limitations period starts running when the plaintiff knows of the discriminatory *act,* not when the plaintiff perceives a discriminatory motive behind the act. *See Merrill v. Southern Methodist University,* 806 F.2d 600, 605 (5th Cir.1986).

Production Co., 784 F.2d at 1279, and when "facts that would support a cause of action are or should be apparent" the statute commences even if the employee is not aware of *all* the evidence that he will ultimately rely upon at trial. *Blumberg*, 848 F.2d at 645 (emphasis added). The showing required at the stage of filing charges with the EEOC is even more lenient, because the purpose of the filing is only to initiate an EEOC investigation. *Pruet Production Co.*, 784 F.2d at 1279.

Applying those principles here, we conclude that whatever concealment Mobil may have been guilty of did not deceive appellants as to the facts of the alleged discrimination. Rather, appellants were able to evaluate the propriety of their alleged constructive discharge for ADEA purposes immediately. Just as in individual discharge cases the *prima facie* showing is only that the employee has been discharged and replaced by a younger worker, leaving exploration of an employer's motives for the EEOC investigation or pretrial discovery, here the appellants' *prima facie* case for constructive discharge was that older employees alone were put to the unfavorable choice of early retirement or loss of the lump sum option. This fact, apparent in July 1984, was sufficient to put appellants on notice of possible age discrimination (as it did other Mobil employees) and to require them to assert their rights.

For these reasons, even accepting for purposes of our review of the summary judgment appellants' charges of nondisclosure, we do not believe that a genuine issue of material fact exists as to when the statute of limitations on the ADEA claims commenced. Concluding that the district court's grant of summary judgment is supported on that ground, we do not reach the district court's further holding that as a matter of law appellants were not constructively discharged in violation of the ADEA.

II. ERISA Preemption of State Law Claims

We next address the district court's grant of judgment on the pleadings on appellants' state law claims. Appellants charged that Mobil's actions in amending the plan and withholding information about the waiver provision fraudulently induced them to surrender their jobs, were taken pursuant to a plan to reduce Mobil's work force, and breached the duty of good faith and fair dealing owed to appellants by Mobil under their employment contracts. This conduct, appellants alleged, gave rise to claims for fraud, civil conspiracy, breach of the employment contract, unlawful interference with contract rights, negligence, and gross negligence. The district court held these claims were preempted because they "relate to Mobil's Retirement Plan, which is governed by ERISA, and directly overlap with provisions of ERISA."

We turn to the first ground relied upon by the district court, namely that appellants' claims "relate to" an ERISA-governed retirement plan.

ERISA's provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a). The Supreme Court has consistently emphasized the expansiveness of the "relate to" standard and its purpose of establishing the regulation of pension plans as an exclusively federal concern. *See, e.g., Ingersoll-Rand Co. v. McClendon,* —— U.S. ——, 111 S.Ct. 478, 482, 112 L.Ed.2d 474 (1990); *FMC Corp. v. Holliday,* —— U.S. ——, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990); *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 107 S.Ct. 1549, 1552-53, 95 L.Ed.2d 39 (1987); *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 103 S.Ct. 2890, 2899-2901, 77 L.Ed.2d 490 (1983). The words "relate to" are to be given their "broad common-sense meaning," *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985), and a state law will be pre-empted "if it has a connection

with or reference to such a plan." *Shaw,* 103 S.Ct. at 2900. This Circuit has held that the fact that a claim sought damages measured by pension benefits sufficed as the requisite "connection" to an employee benefit plan for preemption purposes. *Cefalu v. B.F. Goodrich Co.,* 871 F.2d 1290, 1294 (5th Cir.1989). *But see Memorial Hospital System v. Northbrook Life Insurance Co.,* 904 F.2d 236, 247 (5th Cir.1990); *Pizlo v. Bethlehem Steel Corp.,* 884 F.2d 116, 120-21 (4th Cir.1989).

The complaints here focus on Mobil's amendment of an ERISA-governed employee benefit plan and Mobil's disclosure to its employees of the terms of the plan. In addition to calculating their damages by computing lost benefits under the plan, a court adjudicating appellants' claims of a fraudulent scheme to reduce the work force would have to examine, at a minimum, the operation of the plan prior to the amendment, the language of the plan amendments, and Mobil's communication to its employees about the terms of the plan amendments. Given the breadth of the section 514(a) test, we find that these connections are adequate to warrant preemption.

This conclusion is buttressed by decisions of this and other courts addressing claims of fraudulently induced retirement and wrongful termination, which are the crux of appellants' state law claims here. In the closely analogous case of *Lee v. E.I. DuPont de Nemours and Co.,* 894 F.2d 755 (5th Cir.1990), the plaintiffs alleged that they had retired in reliance on their employer's representations that the company was not preparing to adopt an early retirement incentive plan, and they sued their former employer for fraud and negligent misrepresentation in that respect. We held that the claims were preempted under section 514(a). *Id.* at 758; *see also Cefalu,* 871 F.2d at 1295 (breach-of-contract claim for oral misrepresentation that retirement options offered equivalent benefits was preempted); *Degan v. Ford Motor Co.,* 869 F.2d 889, 895 (5th Cir. 1989) (claim for breach of an

oral agreement to pay early retirement benefits was preempted). In a case almost identical to the present one, the Third Circuit held that where employees alleged that an employer's notification of proposed plan amendments misrepresented to them that they would lose a retirement benefit if they did not retire in a window period before the amendments became applicable, their claims were preempted. *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 923 (3d Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991).

In addition, the Supreme Court recently spoke decisively to the question whether a tort claim premised on wrongful discharge to prevent vesting of pension benefits could survive independently of ERISA. In *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990), the Court found that the claim "related to" an ERISA-covered plan under section 514(a). Appellants here seek to distinguish their "wrongful discharge by fraud" claim from the tort claim at issue in *McClendon*. They argue that whereas the existence of a pension plan is a necessary *element* of the cause of action considered in *McClendon* (discharge to prevent vesting of pension benefits), here the pension plan was merely the *subject* of Mobil's fraud. The fraud claim itself, they argue, is conceptually identical to a fraud claim concerning any other subject matter, and ERISA cannot generally preempt state laws prohibiting employers from fraudulently inducing employees to give up their jobs. Appellants rely on *Mackey v. Lanier Collections Agency and Service*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), in which the Court noted that lawsuits based on "run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan" are not preempted merely because the suits are brought against an ERISA plan. *Id.* 108 S.Ct. at 2187.

We do not find this argument persuasive. We have previously noted that preempted state law includes any

state law cause of action as it relates to an employee benefit plan, even if it arises under a general law which in and of itself has no connection to employee benefit plans. *Cefalu*, 871 F.2d at 1292 n. 5. Although there would undoubtedly be cases of fraudulently induced retirement that were not preempted, the specific conduct here, as in *Lee*, *Cefalu*, and *Degan*, relates directly to the operation of an ERISA plan. Superimposing state law fraud standards on the elaborate ERISA provisions governing the content and timing of notice of plan provisions and amendments, *see* ERISA §§ 102, 104(b)(1), 29 U.S.C. §§ 1022, 1024(b), would undercut the goal of uniform national regulation in the manner that section 514(a) seeks to prevent. *See Memorial Hospital System*, 904 F.2d at 245 (observing that preemption is proper where the state law claims address areas of exclusive federal concern, and where they directly affect the relationship among the traditional ERISA entities). In our view, this makes the conduct at issue here a far cry from the "run-of-the-mill" claims alluded to in *Mackey*.[3]

For the same reason, appellants' reliance on *Hartle v. Packard Electric*, 877 F.2d 354 (5th Cir.1989) (per curiam) is misplaced. In *Hartle*, a discharged employee brought suit for wrongful termination and civil conspiracy to unlawfully terminate his employment. Because the general rule in Mississippi was employment at will, he argued that his participation in an employee benefit plan had removed his employment from employment-at-will

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[3] Appellants also cite *Greenblatt v. Budd Co.*, 666 F.Supp. 735 (E.D.Pa.1987), which does provide more direct support for their argument than the fact that the *subject* of the alleged fraud is pension benefits is incidental and does not warrant preemption. *See id.* at 742. However, we agree with the Seventh Circuit that *Greenblatt* is not consistent with our Circuit's holding in *Cefalu*. *See Lister v. Stark*, 890 F.2d 941, 945 n. 10 (7th Cir.1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 579, 112 L.Ed.2d 584 (1990). Therefore, we, like the Seventh Circuit, decline to follow *Greenblatt*. *See id.* at 945.

status and had effectively given him a tenured position. However, because the employer's complained-of-conduct did not pertain to the operation of an ERISA plan, we observed that Hartle's claim did "not in any manner implicate the federal regulation of employee benefit plans" and held that preemption was not proper. *Id.* at 356. Here, the employer's conduct *does* relate to the pension plan, and federal regulation of retirement plans is implicated to a much greater degree.

Finally, appellants argue that even if their state law claims are preempted to the extent that the damages sought are deemed to be "benefits," the preemption would not bar the claims in their entirety, and that the claims for lost wages, exemplary damages, and the like, would survive as state law claims. They rely on several cases finding partial preemption only. One is *Krause v. Dresser Industries, Inc.*, 910 F.2d 674 (10th Cir.1990), in which a terminated employee filed claims under the ADEA and for breach of an implied contract for tenured job security. The district court entered summary judgment for the defendant on the breach-of-contract claim insofar as it sought lost pension, health insurance, or life insurance benefits, on the grounds of ERISA preemption. The Tenth Circuit upheld a verdict for the plaintiff on the claim for lost salary, however, stating, "We are at a loss to see how a breach of contract claim solely for lost salary is at all related to an employee benefit plan," and holding that there was no preemption of that claim. *Id.* at 680 (citing *Hartle, supra*). Likewise, in *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir.1987), the Ninth Circuit held that an employee's claim of breach of contract and wrongful discharge in part relied on theories independent of the benefit plan and thus was not entirely preempted. *Id.* at 800. Finally, appellants cite *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1245 (11th Cir. 1989), for the proposition that the same set of operative facts can give rise to both preempted and unpreempted causes of action.

We conclude that this type of partial preemption is inappropriate in the present case, however. Unlike *Krause*, this case is not one where the main nexus to an employee benefit plan is only the calculation of damages. Once stripped of its link to the pension plan provided by the measure of damages, the *Krause* plaintiff's claim survived as a suit for lost salary based upon breach of an implied contract of continued employment. Here, by contrast, the basis of the claims themselves is the operation of the pension plan; if appellants' claims were stripped of their link to the pension plans, they would cease to exist. The *Sorosky* and *Clark* courts employed a similar analysis which would support complete preemption in the present case. In *Sorosky*, the court held that Sorosky's claim that Burroughs agreed to provide him with monthly retirement benefits and then sought to prevent him from acquiring those benefits was preempted; it was only breach-of-contract or wrongful discharge theories "that have no relationship to the benefit plan" that survived as independent state law claims. *Sorosky*, 826 F.2d at 800. The *Clark* court confronted an employee's claim that his termination, in addition to being effected for the purpose of interfering with his attainment of pension benefits in violation of ERISA § 510, 29 U.S.C. § 1140, was carried out in a malicious manner that inflicted severe emotional distress upon him. The court held that the tort claim, though it "allude[d] to conduct which was proximate (or even concurrent) in *time* to the alleged ERISA violation," was "wholly remote in *content*"; the employee had "not alleged any conduct on the part of Coats & Clark which relates to the processing of any ERISA covered benefit or claim." *Clark*, 865 F.2d at 1243. However, *Clark* carefully distinguished the employee's claim there from a claim that a refusal to pay pension benefits was itself so outrageous as to amount to intentional infliction of emotional distress, which the court had found to be preempted in *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987).

Because the underlying conduct at issue here cannot be divorced from its connection to the employee benefit plan, we uphold the district court's judgment that the state law claims are preempted in their entirety.

III. ERISA Standing

ERISA grants standing to a "participant" to bring a civil action to enforce his rights under the terms of a plan or to enforce the provisions of ERISA. ERISA § 502, 29 U.S.C. § 1132. The district court granted Mobil's motion to dismiss appellants' ERISA claims on the ground that appellants were not "participants" within the meaning of that section and therefore were not empowered to sue. *See Nugent v. Jesuit High School of New Orleans,* 625 F.2d 1285, 1286 & n. 3 (5th Cir.1980).

ERISA defines the term "participant" to include "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." ERISA § 3(7), 29 U.S.C. § 1002(7). The Supreme Court recently addressed the meaning of the "former employee" component of that definition. In *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), the Court observed that the definition referred to "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Id.* 109 S.Ct. at 958 (quoting *Kuntz v. Reese,* 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied,* 479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986)). The Court also construed the "may become eligible" language of section 3(7) to mean that "a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.*

Mobil argues that appellants do not have standing because they have neither a colorable claim for vested benefits nor a reasonable expectation of returning to covered

employment. In Mitchell's suit against Mobil, the Tenth Circuit denied ERISA standing to the plaintiffs on the ground here urged by Mobil. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

The first part of this conclusion finds support in the decisions of this Circuit. We have held that where, as here, retired employees received in a lump sum benefits that were concededly all to which they were entitled under a plan as it existed at their retirement, their claim is for damages, not vested benefits. *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708-09 (5th Cir.1985) (per curiam); *Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985); *accord Kuntz*, 785 F.2d at 1411. In *Yancy*, the employer announced its intention to modify the interest rate factor used to calculate lump sum retirement benefits, but gave employees approximately three months in which to retire under the older, more generous discount rate. We denied standing to an employee who took early retirement during the three months, received his lump sum payment, then sued alleging that the amendment of the plan violated fiduciary duties imposed by ERISA. We held that, lacking a claim for vested benefits, he could not be deemed a plan "participant." *Yancy*, 768 F.2d at 709.

For the second part of its conclusion—that the plaintiff lacked a reasonable expectation of returning to covered employment—the *Mitchell* court relied on the fact that the plaintiff had not sought reinstatement. *Mitchell*, 896 F.2d at 474; *see also Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3d Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991); *Kuntz*, 785 F.2d at 1411. In the present case, the only request for reinstatement in appellants' original complaint is in the ADEA claim, which we have held to be barred by the statute of limitations. *See* section I, *supra*. However, this

request does indicate that appellants do desire court-ordered reinstatement.

We are not convinced that *Firestone* can be read to reduce the standing question to a straightforward formula applicable in all cases. This seems particularly so in cases involving allegations of discharge. ERISA § 510, 29 U.S.C. § 1140, makes it unlawful for an employer to "discharge, fine, suspend, expel, discipline, or discriminate against a participant" for exercising a right provided by ERISA or "for the purpose of interfering with the attainment" of a right provided by ERISA. The Supreme Court's recent *McClendon* decision held that this provision would foreclose the development of any state law cause of action for wrongful termination to prevent vesting of pension benefits. *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S.Ct. 478, 485, 112 L.Ed.2d 474 (1990). The implication of the Court's holding that the discharged employee must look solely to ERISA for his remedy is that he would have standing to do so. Nevertheless, it is not readily apparent that he would have standing under the construction of *Firestone* urged by Mobil; he would be a former employee lacking both a claim for vested benefits and (unless he requested reinstatement) a reasonable expectation of returning to covered employment. It would be unusual if in that situation his ability to assert a claim at all turned on whether or not his requested relief included reinstatement; it would seem more logical to say that but for the employer's conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits, and the employer should not be able through its own malfeasance to defeat the employee's standing. *Cf. Amalgamated Clothing and Textile Workers v. Murdock*, 861 F.2d 1406, 1418 (9th Cir.1988) ("It would be ironic if the very acts of benefit payment and plan termination that allegedly resulted in a fiduciary personally obtaining ill-gotten profits should also serve to deny plan beneficiaries

standing . . . to redress the fiduciaries' alleged breach of the duty of loyalty.").[4]

Therefore, recognizing that we are anchored at one end by *Yancy*, we also believe that *Yancy* does not extend so far as to encompass situations such as the one at issue in *McClendon*. The question then becomes where on that axis the present case falls. A few pertinent distinctions between the two cases bear emphasis. Yancy's position as a retired employee who had received lump sum benefits was largely of his own making. He was informed of the plan amendment and of the effects of each option open to him. Our holding in the case amounts to a decision that he could not both accept the offered inducement for early retirement and then later complain of the choice to which he had been put; if he felt that he was entitled to continue to work and then retire at the time of his choice with a lump sum calculated at the old rate, he was obligated to act consistently with his desired relief by remaining a covered employee and challenging the plan amendment. The violation he alleged—an amendment of the retirement plan that amounted to a breach of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109—was not one that in and of itself divested aggrieved parties of their status as covered employees able to sue. McClendon, on the other hand, had no such choice. A discharge to prevent vesting of benefits in violation of section 510 by definition must be challenged by someone other than a current employee or someone with a claim to vested benefits. Thus, the standing question and the merits of an employee's claim are unavoidably intertwined to some degree;

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[4] We do not mean to imply that an employee's entitlement to certain *remedies* might not turn on whether or not he was willing to return to work. If, for example, he claimed entitlement to the fully vested pension as damages, it might be perfectly reasonable to require that he return to work at least for the additional length of time required for the pension to vest. However, a wrongful discharge might give rise to other damages as well, for which reinstatement would not seem to be a logical prerequisite.

whether a plaintiff has standing to assert ERISA rights may depend upon whether he can establish a discharge or some other conduct in violation of ERISA, but for which he would have standing. *See Amalgamated Clothing*, 861 F.2d at 1410.

The Third Circuit alluded to this problem in its recent *Berger* decision. There, Edgewater Steel amended its retirement plan to eliminate two benefits: a lump sum payment in place of the first three months of pension benefits, and a supplemental payment given as an early retirement benefit to employees whose retirement was in the mutual interests of the company and the retiree and was approved by the company. Upon announcement of these changes, Berger and the other plaintiffs chose to retire before the amendments became effective. They each received the three-month lump sum provided automatically to all retirees, but none were approved for the supplemental payment. Among the plaintiffs' allegations were a charge that the elimination of the three-month lump sum amounted to the elimination of an accrued benefit in violation of ERISA § 204(g), 29 U.S.C. § 1054(g), and a charge that the amendment constituted an intentional interference with their right to both benefits, in violation of ERISA § 510, 29 U.S.C. § 1140. The court, citing *Kuntz* and *Yancy*, held that the plaintiffs did not have standing to assert their section 204(g) claim because they had retired and accepted the benefits in a lump sum, and had not asked for reinstatement. *Berger*, 911 F.2d at 921-22. However, the court noted the contingency of this conclusion on the denial of the plaintiffs' section 510 claim. *Id.* at 922. It stated: "Of course, we recognize that if the Employees were constructively discharged as they do claim, they would not necessarily have to return to work in order to have standing to claim a make whole remedy." *Id.*[6]

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[6] A Third Circuit decision in a pre-*Firestone* case provides an even more direct illustration of the contingency of standing on the nature of the ERISA violation alleged. In *Saporito v. Combustion*

On the record before us, we cannot say where on the spectrum between *Yancy* and *McClendon* this case falls. Because appellants pleaded their ERISA claims only as contingent on preemption of their state law claims, and because the district court did not rule on the merits of the ERISA claims, appellants have not fleshed out their ERISA claims and theories, or even identified with precision which sections of ERISA they claim were violated. However, their allegations do at least suggest an assertion that they were constructively discharged in violation of section 510 and that but for Mobil's nondisclosure they would be covered employees with standing to challenge the plan amendment. They allege deceptive conduct by Mobil that might be found to vitiate the voluntariness of their decision to retire and that might distinguish the present case from both *Yancy* and *Mitchell*. Appellants also sought reinstatement in their ADEA action, and did not affirmatively indicate that reinstatement was not sought under their ERISA claims. For these reasons,

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Engineering Inc., 843 F.2d 666 (3d Cir.1988), *vacated*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989), the plaintiffs claimed that they had been induced to retire under one retirement plan while the employer concealed the development of a second plan with more favorable terms. The court held that they did not have standing as participants in the first plan to sue for breach of fiduciary duties because they had retired and received all of the benefits to which they were entitled in a lump sum. *Id.* at 671. However, the court did hold that they had standing as participants in the *second* plan to argue that they had been tricked into retiring in violation of section 510, because they alleged that "but for the selective divulgence of information, they would have been members of [the second plan], and, for the purposes of standing to bring an action under ERISA, should be considered as such." *Id.* at 672; *see also id.* at 672 n. 7 (distinguishing *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir.1986), in which the plaintiff urged "but for" participant standing, but his claim was rejected because the events precluding standing were under his control). *Saporito* was vacated and remanded by the Supreme Court for further consideration in light of *Firestone*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989).

we cannot now foreclose the possibility that they could prove facts that would create standing for them, and we believe that the trial court's dismissal on the pleadings of the ERISA claims was premature. Of course, appellants can, and doubtless should, be required to plead their ERISA claims with greater specificity.

We emphasize that we have not determined that appellants will be able to establish a violation of section 510, only that they should be allowed to attempt to do so. We reverse the trial court's dismissal of appellants' ERISA claims and remand for further proceedings consistent with this opinion.

Conclusion

For the reasons stated above, we affirm the district court's grant of summary judgment to Mobil on the ADEA claims and its grant of judgment on the pleadings for Mobil on all of appellants' state law claims. However, we reverse and remand the district court's dismissal of appellants' ERISA claims.

AFFIRMED In Part; REVERSED And REMANDED In Part.

APPENDIX D

THE COURT OF APPEALS OF THE STATE OF COLORADO

Case Number 92CA1395 and 93CA0062

HAROLD A. HOUDEK

v.

MOBIL OIL CORP.

ORDER

Upon consideration of the Petition for Rehearing filed by the Appellant herein, the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including March 14, 1994 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:

DAVIDSON, J.

MARQUEZ, J.

BRIGGS, J.

DATED: February 10, 1994

APPENDIX E

[Filed Aug. 29, 1994]

SUPREME COURT, STATE OF COLORADO

Case No. 94SC149

Certiorari to the Colorado Court of Appeals,
92CA1395 & 93CA0062

District Court, City and County of Denver,
89CV14357 & 90CV13042

HAROLD A. HOUDEK, FREDERIC J. RAYMOND, J.A. MORRISON, GEORGE H. LIVERIS, ROBERT A. IRWIN, CECIL J. ALLMON, JOSE AUGUSTO, JR., R.S. BANNER, JR., A.D. BOND, CLEMONT H. BRUCE, HARVEY A. CARSON, JR., BILLY JACK DUNN, VIRGINIA HOWARD, SYLVESTER J. JAY, T.L. MARTIN, IRA S. REAVIS, E. SHEPARD, HERMAN B. THOMASON, MARION LEON THOMPSON, BILLY RHEA SARGENT, and CLARENCE E. WHITE, for themselves and on behalf of others similarly situated,

Petitioners,

v.

MOBIL OIL CORPORATION, a New York Corporation, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, itself and by the Trustees thereof, and one or more John or Jane Does and/or Doe Entities,

Respondents.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, August 29, 1994.

JUSTICE LOHR and JUSTICE MULLARKEY would grant as to the following issues:

Assuming all of plaintiff's claims are preempted by ERISA, whether the court of appeals erred in awarding attorney's fees pursuant to section 13-17-201, 6A C.R.S. (1987).

JUSTICE MULLARKEY would also grant as to the following issue:

Whether the court of appeals erred in holding that plaintiffs state law claim alleging fraudulent inducement to quit employment is preempted by ERISA when the same plaintiffs lack standing to sue under ERISA and when their state law claim does not relate to an ERISA benefit plan.

MAC V. DANFORD
Clerk of the Supreme Court

By: /s/ Carolyn Rice
CAROLYN RICE
Deputy Clerk

APPENDIX F

SUPREME COURT
STATE OF COLORADO

Case No. 94SC149

Certiorari to the Colorado Court of Appeals,
92CA1395 & 93CA0062

District Court, City and County of Denver,
89CV14357 & 90CV13042

HAROLD A. HOUDEK, FREDERIC J. RAYMOND, J.A. MORRISON, GEORGE H. LIVERIS, ROBERT A. IRWIN, CECIL J. ALLMON, JOSE AUGUSTO, JR., R.S. BANNER, JR., A.D. BOND, CLEMONT H. BRUCE, HARVEY A. CARSON, JR., BILLY JACK DUNN, VIRGINIA HOWARD, SYLVESTER J. JAY, T.L. MARTIN, IRA S. REAVIS, E. SHEPARD, HERMAN B. THOMASON, MARION LEON THOMPSON, BILLY RHEA SARGENT, and CLARENCE E. WHITE, for themselves and on behalf of others similarly situated,

Petitioners,

v.

MOBIL OIL CORPORATION, a New York Corporation, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, itself and by the Trustees thereof, and one or more John or Jane Does and/or Doe Entitites,

Respondents.

ORDER OF COURT

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, SEPTEMBER 16, 1994.

[Supreme Court, State of Colorado Court Seal]